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VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 10

MAURICE E. TRAVIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 16, 1959
CERTIORARI GRANTED MAY 31, 1960

SUPREME COURT OF THE UNITED STATES

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MOTION FOR PRODUCTION OF STATEMENTS AND FOR PRODUCTION OF GRAND JURY MINUTES AND RULING THEREON

Mr. Witt: At this time we make the same motion as we made in the case of the witness Eckert and the witness Gardner under Section 3500 of the Criminal Code and with respect to any grand jury testimony which this witness may have given.

The Court: Of course, the motion with respect to the grand jury matter will be denied now subject to your leave to represent the matter, but the motion with respect to 3500 will be considered. And what is the position of the Government about that?

Mr. Kelley: I respectfully state to your Honor that we have nothing that is wholly relevant to the testimony of the witness on direct examination, but we do have a number of documents to present to the Court in camera.

The Court: In other words, you are taking the position that you have nothing to submit without first submitting it to the Court?

Mr. Kelley: That's correct, your Honor.

The Court: Are the matters that you desire to submit to the Court under 3500 available?

Mr. Kelley: They are available, your Honor, and I would say to you that we will have them down to you by the time that you have completed your examination of the documents pertaining to the previous witness.

The Court: Sometime tomorrow they will be available?

Mr. Kelley: Yes.

The Court: I wanted to know they are available. All right, we will proceed on that basis. Of course, the defense will not be in position to cross-examine until they have ascertained what is furnished under 3500.

Mr. Witt: If the Court please, may we approach the Bench for a moment before your Honor talks to the Jury about the recess?

[fol. 636] The Court: Yes.

(Conference at the Bench.)

In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: What is to be mentioned now?

Mr. Kelley: Your Honor, I would like to make a record. First, I want to hand you two of the reports relating to the witness Gardner and would like to make this statement for the record. This is in the nature of preliminary to making any request of the Court. It probably will sound argumentative, which it is, but it is preliminary to a request that I want to get into the record. If 18 USC 3500 is to be interpreted in the light of the Jencks decision, it might be well to look at the factual situation which to (sic) Justice Brennan called for the conclusion which the Court reached. It should be borne in mind there were other witnesses in the Jencks trial who were not paid informants and that the Court did not dwell on failure to furnish any reports they might have made.

The Court pointed out that Matusow and Ford "were Communist Party members paid by the Federal Bureau of Investigation contemporaneously to make oral or written reports of Communist Party activities in which they participated."

I want to point out particularly that they were to make contemporaneously oral and written reports of their activities. And then the opinion goes on, "They made such reports to the FBI of activities allegedly participated in by the petitioner, about which they testified on the trial."

It is significant that the Court noted that Ford, "became a paid undercover agent for the FBI and reported regularly upon Party activities and meetings." The Court noted that from 1948 through '53 Ford had been paid $7,025.00 for his services. Later the Court pointed out that Matusow "was a paid undercover agent for the FBI before he went to New Mexico."

The trial court denied a request for the production of their reports, and the Supreme Court held that to be error, and they held, one of their holdings was, "That the petitioner was not required to lay a preliminary foundation of [fol. 637] inconsistency because a sufficient foundation was established by the testimony of Matusow and Ford that

their reports were of the events and activities related to their testimony."

The defendant does not now have to lay any foundation under Section 3500, but the Court has to determine what portion of the documents produced by the Government amount to the witness's "reports * * * of the events and activities related to" his testimony. The Jencks decision again talks about "their reports".

The type of investigative report submitted here, which I have handed to the Court does not purport to be a report of the witness. It is not substantially verbatim, it is not contemporaneously recorded, and I point out one of these was approximately 30 days from the time of the contact by the agent with the witness, and it has not been signed or in any manner adopted by the witness.

In addition to holding that no foundation was required for production the Court held in the Jencks case that the Government should produce "all reports of Matusow and Ford in its possession, written, and when orally made, as recorded by the FBI, touching the events and activities as to which they testified at the trial."

It is apparent to me that Congress correctly interpreted the significance and purport of the Jencks decision in Section 3500. The terms of the statute simply clarified the language of the opinion. To be producible the statement if written must be that of the witness either signed or adopted in some other manner by him. If it is oral, the statement must be "a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of an oral statement.

In view of the foregoing the Government respectfully requests the Court to reconsider the application of 3500 to the documents submitted and advise us whether or not the prior deletions are all that the Court feels should be deleted under Section 3500.

The Court: Well, I gather what you are saying is that [fol. 638] in the statement produced by you pursuant to the defendant's motion that there are certain items which are stated in the papers you submitted as being statement by the witness Gardner to an FBI Agent, and I gather

what you are saying is that you think that that should be excised because it doesn't come within the definition of the statement in 3500. Is that what you are saying?

Mr. Kelley: Well, that is partly in it. In addition, I am saying there is information in there which does not fall within the definition of "statement" which could very well be the statement of the agent rather than that of the witness, and, further—

The Court: Well, on that phase the Court agrees with that part of it, and I didn't think in my determination of what was to be excised that I included anything that was a statement of the agent or conclusion of the agent. What I attempted to cover and say should be produced were statements made to the agent by the witness. Now, if there is anything included, I haven't seen, of course, what the mechanical reproduction results of what I indicated on these slips that I fastened on there would be, but I don't recall anything like that.

On this other business I want to point out that under 3500 I don't see any contemplation in here of the Court's determination after you have submitted the matters as statements of whether they are statements or not. It is the Court's sole duty under 3500 where you have produced the material to simply excise the portions of said statement which do not relate to the subject matter of the testimony of the witness.

In other words, let's go over the section. As I understand it again, I have got it right here before me, Subdivision (b) is the one we are concerned with to start with, there is nothing here that has anything to do with that. It says, "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

That is the order that has been made in this case in the [fol. 639] first instance. Then omitting the second sentence of Subdivision (b), Subdivision (c) says, "If the United States claims that any statement ordered to be produced under this section—" those are the ones you tender as being within the category and within the definition of

"statement" as defined in the statute, "If the United States claims that any statement ordered to be produced—" again, that is the ones you proffer—" under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness."

In other words, I apprehend or understand under Section 3500 that after the Government has produced the material, given it to the Court that the Court's sole duty then and sole function is to excise the portions of such statement which do not relate to the subject matter of the testimony and that the Court then, the Government having in the first instance produced this matter and as statements, is not required to determine in camera whether it does constitute a statement under Subdivision (e) of 3500, because the reports would indicate just as the matter we are talking about and as some excerpts furnished with respect to this first witness Eckert, so, it is simply a recital that the witness stated as follows to the FBI.

Now, by the fact that the Government produced the report and the statement I think it possibly could be assumed that it came within the definition of "statement" and that the Government more or less conceded that it came in the definition of "statement", because there is no way of knowing whether the witness read it over after it was written or it was reported contemporaneously or anything else from the face of the report. The moment the Government says, "Here are statements made by this witness but we contend that part of them should not be given to the defendant because they do not relate to the subject matter of the testimony of the witness," why, that is the sole function of the jury. The matter of what is produced in the first instance is based on the direction of the Court to start with. "* * * the court shall order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

[fol. 640] What is produced in the first instance is a matter that you determine. Then, if you say, "Well, here is the statement all right, but we think in the statement are matters that I have said that are not the subject matter of the testimony of the witness on direct, we want the Court to determine what portion should be excised," then that is the Court's duty, because these other matters of whether that was made contemporaneously, whether he otherwise adopted or approved it, those things are going to the United States. So, with respect to this particular witness here and with respect to these particular documents, and those are the only ones that have been handed to me, I do not believe that the Court can go into the question of whether they are statements, because you have branded them as such by the very fact of producing them. That is what seems to me to be the case.

Mr. Kelley: Well, your Honor, I see what is creating our problem. We have taken a slightly different view of the approach to it than the Court has. I think probably the Court is right on it. We have produced things that we do not think were statements either oral or written of the witness, and Mr. Witt pointed out one the other day that was an inter-office telegram which he pointed out to us would not come within 3500.

Mr. Witt: I have changed my mind on that since. I want the record to show that I now think I was wrong.

The Court: That is water under the bridge, because I produced that. But I am inclined to think and I might add just categorically in this group I do not think there is anything that comes in that category, but I, myself, at the moment feel that that was probably—that it wasn't within this category, but, as I say, the thing I believe is just what I have stated here, that when they are submitted that the Court's sole duty under 3500 is to excise the part that is not relevant in effect, and, not to go into the question, because when the Government produces them they know in effect these are statements, and I think that is what they have been called, and the statute expressly says as hereinafter defined.

Now, these matters that we are talking about, as I reiterate, are just statements by the agent that whatever the witness's name is stated the agent so and so and re-

cites some matters, of course, which obviously I expect [fol. 641] would be assumed to be written by the agent. On the other hand, under this definition, if they were adopted or approved by the witness, or, if they were verbatim statements written out in longhand right at the time contemporaneously they would come within. Those things are within the Government's knowledge, and when they produce the statement I don't think I can go back of that. The initial problem is on you as to what you produce in the first place I expect.

Mr. Kelley: Well, I think that clears up our problem. I would not be positive, but it is my recollection that we have submitted these as documents relating in part to the testimony of the witness on direct; it wasn't our thought that they constituted statements.

The Court: Let's get the record clear on that. I don't think that is the way the record is, and I don't think there is anything in the statute that places on the Court in camera an obligation to determine whether it is a statement or isn't a statement. I think what they demanded, and I think the record will show it, is that the statements they claim were made by the witness, they have made the demand under 3500, and then when the demand is made as this statute says the Court orders you to produce any statement as hereinafter defined of the witness in the possession of the United States. That is what the order was. Then you get up and say, "Here are the statements that we have. We contend that a portion of these statements do not relate to the subject matter of the testimony of the witness and wish the Court to examine them and determine what portions are to be excised. That is the philosophy of the statute. It is not to get into a determination, there is no basis for the Court to make the determination you are talking about.

Mr. Kelley: Well, of course, there might be an argument as to what is contemporaneously made. That is like reasonable time and those things, and whether that was intended to be left to the discretion of the Government or to the Court is a problem that this statute presents, and whether it is substantially verbatim is in the same category, and those are problems which we have been struggling with on this thing and trying to work within the statute and

within the spirit of it, why we have produced many things which we felt did not come within the purview of the statute, so, it may be that we should reappraise our approach.

[fol. 642] The Court: I think from here on you had better consider what you want to do before that. That problem isn't before us. You haven't produced anything on this last witness—what is his name?

Mr. Kelley: Mason.

The Court: You haven't given me anything but on this Gardner business I think those were produced in the circumstances I just indicated, and I think that the part I have marked here of these statements that you are apparently objecting to was just a recital that Gardner stated to agents such and such. I think they should remain in.

Mr. Kelley: Well, may I or should I interpret that remark as saying that as the record now stands and as your order now stands that we produce according to the previous—

The Court: According to this memorandum I have made, and that has just this little one exception to it. I made it as carefully as I could, made the notations, but I haven't seen the results transposed into the photostats produced. Now, you said a moment ago that, you said included in the matter I said should be given them were some matters that were purely and wholly the statements of an agent, not the witness, of an agent. Now, if that is a fact, I think probably I should—I think probably I just made a mistake, but personally I don't think it is a fact, but it will develop by my looking at the record again. Subject to that exception I think you should give them the part I have indicated.

Mr. Kelley: We are ready to comply with the Court's order, but I think this has been a very helpful discussion as far as I personally am concerned in trying to understand the operation of this Section.

The Court: I think it is something you had better think about yourself before this next one is produced. When can you give them the material on Gardner?

Mr. Witt: It is of the utmost importance to us that we

be given an opportunity to make our record on this whole procedure before you go on to other problems.

The Court: Well, I am just asking them when they can get them.

[fol. 643] Mr. Witt: Before we leave what you and Mr. Kelley were discussing most of which we are not privy to we did want to make a record, and we think it is quite important.

The Court: All right.

Mr. Witt: But aside from saying now that we object to this entire procedure that the Court and the prosecution have been following may we confer for a moment or two before we make our record on this problem?

The Court: Yes.

Mr. Witt: If the Court please, we are not disposed to take your time to argue these objections we make that I am about to make. All we want to do is state them for the record to preserve our record. First, we object again to the procedure that is being pursued. We object to it whether your Honor believes it is authorized by 3500 or not. The other day we said we object to the procedure if authorized by 3500 because it violates due process in the sense that the Court and the prosecution is discussing evidence or material that is vital to our right of defense and vital to our right of cross examination and the defense is not privy to the discussion or the defense has no idea as to what is going on between the Court and the prosecution and what material, statements or otherwise that the Court and the prosecution are discussing.

In that sense especially in view of what Mr. Kelley had to say this morning it is our view now that the procedure that is being pursued is an improper interpretation of 3500, but, if, however, we are wrong about that and the procedure which is being pursued does conform to requirements of 3500, we say that 3500 denies due process and the right to the defendant to a fair trial and also especially in the light of what Mr. Kelley said this morning violates the doctrine of separation of powers, and that according to what Mr. Kelley has said as he reads 3500 it is the responsibility of the prosecution to make the decision in the first place as to what should be produced for the defense and what should

not be produced for the defense and what the defense should say and what the defense should not say.

Now, going next to that point aside from the constitutional issues and getting back to our view of the procedure [fol. 644] under 3500 we say that in that respect we have not called attention to the procedure that has been violating 3500. As we read 3500 once we make our motion for production the prosecution is required to produce directly for the defense without producing first for the Court whatever is in the possession of the prosecution to which the defense is entitled under 3500.

Now, with respect to the witness Eckert and now with respect to the witness Gardner the prosecution has been turning over nothing directly to the defense. First, everything that is turned over is turned over first to the Court. It is clear to us from the material we got pursuant to the order of the Court relating to the witness Eckert that all, at least most of that material constitutes statement as defined in 3500, and, therefore, there is no question but that that material should have been turned over to the defense directly without being routed to the Court.

Beyond that we strenuously object for the reasons we have stated and for additional reasons to the prosecution's, to begin with, deciding even what should be turned over to the Court in order to determine not what is relevant or irrelevant contained in documents which are otherwise statements but in order, to begin with, what are statements. For example, under the most extreme illustration in what Mr. Kelley had to say Mr. Kelley referred to the problems posed by the word "contemporaneously" in the definition of statement in 3500, and we raise the question as to whether or not a document, which was reported by an agent after the witness orally told the agent what the agent later reported in the document he raised a problem with respect to that as to whether that document was contemporaneously recorded.

Now, we object to the prosecution's making those decisions without the defense being privy to them and more seriously without even the Court's being privy to them. It is our position, and, if we followed the Court this morning, we think the Court is inclined to agree with us, but I am

not sure, it is our position that once the prosecution determines that the particular document relates to the subject matter of the witness's testimony then the documents should be turned over either directly to the defense assuming they contain no irrelevant material, or, if the prosecution believes they do contain irrelevant material, then to turn them over to the Court.

[fol. 645] If Mr. Kelley's interpretation is correct, it can be that 99 percent of the documentary material in the possession of the prosecution would never be disclosed to the Court let alone to the defense and especially in view of the terribly burdensome task of examining these witnesses in chambers about the statements they have made to agents of the Government, the almost insuperable task in achieving our objective. We think that procedure whereby the prosecution determines that it won't turn over documents in the first place is peculiarly vicious. I do not use the word in any personal sense but in the sense of emphasizing our very, very strong objection to it, and we think that violates the intent and purpose of 3500, and, if it doesn't, it certainly violates our right to a fair trial and flies squarely in the face of Jencks.

On that as to Jencks I disagree with what Mr. Kelley had to say about the meaning of that opinion. It is true that the Court used the language that Mr. Kelley quoted, but it used it in the context of the facts in that case. And, specifically, as I see it on the subject, it does not make the slightest bit of difference whether the witness was an informer in the pay of the FBI at the time the reports or statements were made or whether he is a person who wasn't in the employ of the FBI at the time he made his statements.

The Court: I think we will go along the line I have stated. I think the statement you just made is consistent with the position that you have taken right along with respect to this matter. When will the Government be able to furnish the actual material that goes to the defense on this Gardner case?

* * * * * * *

[fol. 656] In Open Court

FRED GARDNER, resumed the stand, and testified:

Cross examination.

By Mr. Witt:

Q. Mr. Gardner, will you tell us when and where you were born?

A. I was born in Galena, South Dakota, July 13, 1906.

Q. Mr. Gardner, you have given testimony as a witness for the Government in other proceedings, haven't you?

A. Yes.

Q. Will you tell us in which proceedings before this one you have testified?

A. I testified in the Cleveland conspiracy trial a couple of weeks ago. I testified before grand juries in Denver, Cleveland, and New York.

[fol. 657] Q. Will you give us the dates when you testified before the grand juries taking them one by one?

A. Well, I testified in Denver I believe it was in the summer of '56. I don't recall just what month that was. I testified in Cleveland before the grand jury about January of '57. I testified in Denver in the summer of '57—no, I think that would be the summer of '56 in Denver, and—

Q. I am sorry. That is what you said before.

A. It occurs to me I am a little confused as to these dates, but I think that was the summer of '56.

Q. When you say "that" what was that?

A. The Denver Grand jury.

Q. All right.

A. I testified in Cleveland in I believe it was January of '57 before the Grand Jury and later at the Cleveland conspiracy trial that is in the process of being tried now.

Q. That is what you were referring to when you said—

A. And—

Q. Just a minute, Mr. Gardner, please. Let me finish my question. Why don't you sit back?

A. I am very comfortable, Mr. Witt.

Q. Take your time, because you make me uncomfortable if you don't.

A. I am very sorry.

Q. When you just said again something about the Cleveland conspiracy trial that is the trial in which you said you testified a couple of weeks ago?

A. Yes, sir.

Q. And in any event with respect to the Cleveland Grand Jury you said that was you think January of '57, is that right?

A. Yes. At New York I believe it was about December of '56. There, again, I am not sure. It was in the wintertime, and it occurs to me it was probably about that period of time, somewhere between December and February. It could have been after the New Year.

Q. That would be between December of '56 and February of '57, right?

A. Yes.

Q. You haven't testified in any trial in New York in open court?

A. No, sir.

Q. Now, aside from these occasions when you testified as a witness for the Government have you ever given testimony in any other trial, hearing or proceeding before a body of the United States?

A. Well, I was subpoenaed before the McCarran Committee in Cleveland. I believe that was in '52.

Q. And did you testify?

A. Yes, sir, I did.

Q. Now, Mr. Gardner, you referred to that as the McCarran Committee. Is that the committee also more officially known as the Senate Internal Security Subcommittee?

A. Yes, that's right.

[fol. 658] Q. You said in '52. Do you remember when in '52 that was?

A. Offhand I can't recall. It was during the summer of '52.

Q. Do you recall how many members of the Subcommittee sat during those hearings when you testified?

A. All I recall was Arthur Watkins, the Senator from Utah.

Q. Any others?

A. I don't recall any others. There may have been. There

were several fellows up in front, but Senator Watkins was the Chairman of the Committee that met there.

Mr. Witt: May I talk to Mr. Kelley about the Senate hearings—I have already discussed it with him—off the record, please? If the Court please, based on my off-the-record discussion with Mr. Kelley I now propose that it be stipulated that the witness Fred Gardner testified before the Senate Internal Security Subcommittee in Cleveland on April 17, 1952, and that this copy of those hearings and quoting Mr. Gardner's testimony is an official copy published and put out by the United States Senate relating to those hearings.

Mr. Kelley: We stipulate to that.

The Court: All right.

Mr. Witt: And Mr. Kelley has also agreed off the record, if the Court please and ladies and gentlemen of the Jury, that I may use this document in further cross examination of the witness.

Mr. Kelley: I want the record to be clear on that. I have agreed that it is official and that so far as material or relevant that he can. It is not a broad consent.

The Court: All right.

Mr. Kelley: I want to reserve the right to object to any particular questions.

Mr. Witt: That is understood.

The Court: All right.

Q. Now, Mr. Gardner, you said a moment ago that your recollection was that you testified before that Senate Subcommittee in the summer of '52. Now that you have heard [fol. 659] the stipulation to the effect that you testified on April 17, 1952, would it be your recollection now that it was that date?

A. Well, it could very well be. I said the summer of '52 only because it was warm weather when we had it, and warm weather comes to Cleveland in April too.

Q. Now, Mr. Gardner, before you took the witness stand in this trial last Thursday you had given information to the FBI, hadn't you?

A. Yes, sir.

Q. Will you tell us according to your best recollection when was the first time you gave information to the FBI?

A. Well, the first to the best of my recollection it was six to nine months after I was expelled from the Party which took place in, oh, I believe about April, March or April of 1955.

Q. And when you say which was March or April of '55 are you referring to the time when you were expelled from the Party—

A. Yes, sir.

Q. Mr. Gardner, please let me finish my questions. Will you please read the question?

(The reporter read the last question.)

Q. —or are you referring to the time you first gave information to the FBI?

A. I am referring to March or April as the time that I was expelled from the Communist Party.

Q. And you said it was six to nine months after that that you first gave information to the FBI, is that right?

A. That's right.

(Document marked Defendant's Exhibit I for identification.)

Q. Mr. Gardner, didn't you give information to the FBI in Butte, Montana, in August of 1955?

A. Well, I don't recall the exact date. I fix the time at approximately six to nine months after I was expelled from the Party. Now, I don't know how to fix the exact date. There was first a contact made in which no information was given.

Q. Mr. Gardner, please forgive me for interrupting you, but I haven't asked you to explain the operations of your mind or go into something else. I simply asked you whether you recall giving information to the FBI in Butte, Montana, in August of 1955.

A. And my answer is I do not recall giving information in August.

Q. Now then, Mr. Gardner, I show you Defendant's Exhibit I for identification, which is a document furnished to [fol. 660] the defense by the prosecution, and I will ask you

to look at that page, which is marked with that exhibit number, read what is on that page, check the date there and at the top of that form, and I ask you whether that doesn't say that you furnished—

Mr. Kelley: Just a moment. I think, if you are going to read from the exhibit, it should be offered in evidence before you read from it.

Mr. Witt: I want to lay foundation. I don't care, either way.

The Court: I think it can be offered. The point Mr. Kelley is making has some merit in this, if he reads from the document, why, of course, it should be in evidence. If you wish to show it to him to refresh his recollection and ask him if he recalls that he made that statement—

Mr. Witt: I will do it the way your Honor suggests.

Mr. Kelley: Counsel was reading from it. That was my point.

Mr. Witt: I am sorry if there is any question about anything I am going to read in the record. It is going to get in evidence.

The Court: The document itself can be offered in evidence if it is relevant, but I think you can ask him if he recalls from looking at the paper you have displayed to him whether he did what you wish to ask him.

Mr. Witt: I will do it either way as your Honor suggests. I am used to the other procedure.

The Court: The point Mr. Kelley was making was you were reading from something that wasn't in evidence.

Mr. Witt: I might as well offer it.

The Court: Yes.

Mr. Witt: I offer in evidence this one-page document which has been marked Defendant's Exhibit I for identification.

[fol. 661] The Court: Is there any objection?

Mr. Kelley: Yes, the Government objects to its introduction in evidence and its use on cross examination for the reason that there is no proper foundation laid, and specifically, it is my position that before it can be used for any purpose it has to be shown that the witness had seen this and adopted the statement as his own.

The Court: At the moment you are just engaged in fixing a date, is that right? Is that what the purport is now? I think you had better stay with that now, and I will reserve ruling on its admissibility in evidence. The question at the moment is, as I understand it, inquiry directed to whether he made a statement to the FBI at about the time Mr. Witt suggested.

Mr. Witt: No, I am not suggesting anything in view of what Mr. Kelley said. I want to show from the FBI's own records as furnished to the defense as to when it was.

The Court: You may be able to show it as to the date but not as to the contents, is Mr. Kelley's objection at the moment, and I think we had better get the date established, and then you can let the witness read that and ask him if he made the statement or something along that line.

Mr. Witt: I am not going into content in terms of this document. There is no content on it except the date, this particular page.

The Court: Well, if it is only admitted as to the date—I haven't seen it, and I do not know what you are talking about. I am reserving ruling on the motion for its admissibility in evidence, and let's see if you can develop what you are talking about, or, as I understand, it is a date, by letting him refresh his recollection and look at it and see what he says about that.

Mr. Witt: May I have my offer in evidence of this document pending—

The Court: Let me see what it is. I am not advised as to what it is. You are only offering this one sheet?

[fol. 662] Mr. Witt: That is all. That is all that is relevant.

The Court: What objection do you have to that one sheet? There is no statement.

Mr. Kelley: I have no objection to his handing it to the witness as you suggested and asking if this refreshes his recollection as to the line of inquiry, but I object to it as a fundamental proposition of introducing it until it is shown that the witness had previously seen it and adopted it as his statement.

The Court: There is no statement in it, is the point I am making. The statement is simply to the effect that he

gave certain information, and there is nothing in the sheet he has offered that discloses any statement at all. It is just the fact that he did talk to the agents at that time.

Mr. Kelley: That's correct, and, if he wants to use it for purposes of refreshing his recollection, I have no objection.

The Court: I think I will admit this sheet in evidence for the purpose of showing simply the date of this alleged discussion with the FBI Agents.

Mr. Witt: Thank you, your Honor.

(Defendant's Exhibit I for identification received in evidence.)

Q. Mr. Gardner, I will ask you to look at this one sheet, Defendant's Exhibit I, and I will ask you to read it to yourself, and I will ask you whether that doesn't refresh your recollection that you furnished information to the FBI in Butte, Montana, in August of 1955.

A. Yes, on August 31 and September 9. That is about six months afterwards, and I say that would fit into my thinking that it would be about six months after I was expelled. That is the only way I can fix the dates as probably correct. I don't remember the specific discussion now.

Q. Mr. Gardner, when was it you testified in the Cleveland case in open court again?

A. I think it was a couple of weeks ago.

[fol. 663] Q. Can you fix the exact dates?

A. I imagine it was last Monday.

Q. Last Monday?

A. A week ago.

Q. That would be Monday, the 20th, is that right?

A. I think so. I think that's right.

Mr. Witt: In order to save time again, your Honor, may it be stipulated that the witness testified in the Cleveland case, United States vs. West, the week before last on Tuesday, January 14, Wednesday, January 15, and Thursday, January 16, 1956?

Mr. Kelley: Does that appear in here some place?

Mr. Witt: May the record also show that in order to save time this morning I exhibited these transcripts to Mr. Kelley last week so he could look them over, discuss them

with the witness, so we would not have to waste time on these problems this morning?

Mr. Kelley: I resent the implication of that. They were submitted to me so that the witness could look at them to determine whether it was a correct reflection of his testimony at the trial. I did not have an opportunity to look at them. They were returned as soon as the witness had checked them.

Mr. Witt: I didn't mean to imply Mr. Kelley checked them.

The Court: What is the point? What he is asking for is a stipulation as to accuracy?

Mr. Witt: No, at the moment as to the dates.

Mr. Kelley: As to the dates he testified. I don't know what dates he testified.

The Court: The witness has testified to the dates. He testified that he testified there at about the time he indicated.

Mr. Witt: I am impeaching the witness as to his memory.

The Court: Well, if the records are in contradiction, of course, you will have to establish it by the record.

[fol. 664] Mr. Kelley: If you will point it out, I will be glad to stipulate to it. I am not going to read the whole thing to figure it out.

Mr. Witt: You don't have to read the whole thing. I think we can show that. We may have to bring the reporter in from that trial, your Honor, but I don't think that will be necessary. May I show this to Mr. Kelley?

The Court: Go ahead and show it to him and ask him about it. I am a little in the dark as to what you are trying to accomplish here.

Mr. Witt: I want to show the exact dates the week before last in Cleveland.

The Court: Ask him.

Mr. Witt: I just asked him, and I am seeking to impeach him.

The Court: I do not see any basis for impeachment in that respect.

Mr. Witt: If the Court please, I do not think you should make a comment on that until I complete this.

The Court: Show him the dates.

Mr. Witt: In view of that discussion I will ask Mr. Kelley.

The Court: All right, show him.

Q. Mr. Gardner, isn't it true that you testified in Cleveland on Tuesday, Wednesday, and Thursday, January 14, 15, and 16, 1958?

A. I think that's right since you mention it. I might have misjudged that by a day or two.

Q. Now, Mr. Gardner, you were cross-examined, weren't you, when you were on the witness stand in Cleveland about when it was that you first furnished information to the FBI?

A. I believe I was.

Q. Didn't you testify there on cross examination—

[fol. 665] Mr. Witt: Excuse me, your Honor.

Q. Didn't you testify on cross examination in Cleveland that the FBI first spoke to you at home in Butte in March, 1956, as a result of which you thereafter went to the FBI office in Butte and then signed a statement for the FBI in July of 1956?

Mr. Kelley: The Government objects to that as improper procedure.

The Court: I will sustain the objection. You can ask him if he made answers specifically to the questions and read the answers, and, if they are contradictory, you can show the contradiction by the record, but your using your interpretation of the testimony and asking him with respect to that I do not think is proper. He has a right to be faced with the precise statement.

Mr. Witt: I was trying to save time. It ran over many pages.

The Court: Read the specific questions and answers.

Mr. Witt: It becomes confusing again. I will do the best I can, and then we will see if we can't save time.

Q. All right, Mr. Gardner—

Mr. Witt: Do you want to follow, or shall I ask the witness?

The Court: Ask the witness.

Q. I will ask you if you didn't give the following answers to the following questions on cross examination in Cleve-

land on page 807: "Answer: I gave some information to the FBI, I believe, about six to nine months after I was expelled from the Communist Party. Question: Would that be December of 1954? Answer: I was not expelled in '54, so, it would not be December. Question: Would that be December of 1955? Answer: I would rather believe it was sometime early in '56. Question: And to your best knowledge what date was that in 1956? Answer: Oh, best of my recollection it might be March. Question: And was it the first week of March? Answer: I don't remember. Question: To [fol. 666] your best knowledge? Answer: I'm not positive that it was in March. I'm saying March, that is the best of my recollection in that period. It could have been March, it could have been April. Question: Of 1956? Answer: Of 1956."

Turning to page 808, "Question: Now, is this the time that you gave this information to these FBI Agents in March of 1956? Answer: What information, sir? Question: Relative— Answer: I don't understand your question. Question: Did you make any statement relative to your Communist Party activity to the FBI at that time? Answer: Yes, sir. Question: Concerning the subject matter of your testimony here today? Answer: I don't recall making any statements relative to anything I have testified to here today. I told them about my Communist Party activities. Question: Where did you meet with these agents of the FBI? Where did you meet with them? Answer: I believe in the Office of the FBI. Question: Where? Answer: In Butte, Montana. Question: And what day was that or week, if you recall, and what month? Answer: The best of my recollection it was in March or April of 1953."

May I stop there? That is an obvious typographical error. That should be March or April of 1956. Is that right, Mr. Gardner?

A. That's right.

Q. "Question: Now was this information that you gave to the FBI Agents taken down at that time, if you recall? Answer: I don't recall. At least I don't know whether— there was nobody taking notes, if that is what you mean."

Mr. Witt: Then, I will skip a little at the top of page 809, if the Court please and Mr. Kelley, to save a little time.

Q. "Answer: No, sir. They—as I recall it, the first contact was made with me at my home. They came to my home. And it was sometime after that, maybe two—three weeks after that I went to their office. Question: And when they first got to your home, how many agents were there at that time?" I will skip that and get to the dates, if the Court please and Mr. Kelley, top of page 810. "Question: To the FBI Office in Butte? Answer: Yes, sir. Question: Was that still in May or was that— Answer: Well, it was in that period of March or April. Question: Now when you got down to the office did you make any statements to the FBI [fol. 667] then? Was it the same Agent? Answer: Well, I talked to them, then, about my activities." Now, Mr. Gardner, having heard that testimony of yours in Cleveland do you recall that you testified there that—

The Court: The question is is (sic) to ask if he recalls that as being his testimony or if he didn't so testify. If he didn't, you can offer the record if it is contradictory. If he says that is the way he testified, that is it.

Q. Do you recall giving that testimony?

A. I would believe that is my testimony.

Q. Now, Mr. Gardner, did you give information at any time to the FBI while you were with Mine-Mill during the period from 1951 to 1955?

A. I did not, and I don't believe I even knew an FBI Agent during that period to know he was an FBI Agent.

Q. You have gotten to know quite a few FBI Agents since you left Mine-Mill, haven't you?

Mr. Kelley: The Government objects to that as argumentative.

Mr. Witt: I withdraw it.

Q. Mr. Gardner, when you testified before the Senate Subcommittee in Cleveland in April of 1952 do you remember being asked where and when you were born?

A. No, I don't specifically remember that.

Mr. Witt: Pursuant to our understanding I will not have this document marked for identification. Our understanding goes to all transcripts and official documents.

The Court: All right.

Q. Now, Mr. Gardner, I will ask you whether you don't recall being asked the following question by Mr. Arens of the Committee staff and giving the following answer when you were before Senator Watkins in Cleveland in April, 1952: "Mr. Arens: Where and when were you born? Mr. Gardner: I was born in Galena, South Dakota, in July, 1907." Do you remember that?

A. I don't remember specifically the dates.

Q. Were you born in 1906 or 1907?

A. I was born in 1906, and I have a birth certificate to bear it out, and, if they made a mistake there, I can't help that.

[fol. 668] Q. I asked you if you remember giving that answer when you were before the Subcommittee.

A. No, sir.

Q. Mr. Gardner, before you took the witness stand in this trial last week—I withdraw that. I am sorry. Mr. Gardner, it is true, isn't it, that when you were with Mine-Mill you would submit yourself so-called expense vouchers to the International Union twice a month?

A. Yes, sir.

Q. And those expense vouchers would show what expenses you had during the semi-monthly period particularly as to your mileage and per diem and extraordinary expenses, is that right?

A. Well, usually, unless they was asking us for some special contributions and they would tell us, "Well, you can put a trip down to cover that for the Party." I have had that happen.

Q. Aside from those occasions when you made a special trip for the Party normally they would cover your expenses during the semi-monthly period, is that right?

A. Yes, sir.

Q. Did you keep copies of those vouchers for yourself?

A. I probably did for a while.

Q. During what period was that when you say "for a while"?

A. Oh, I would keep them for a couple of months to see if there was any question.

Q. Then you would throw them away?

A. Yes.

Q. Do you have any copies of those vouchers in your possession at the present time?

A. I doubt it. I think I threw everything away.

Q. In any event did you look at copies of any of your vouchers before you took the witness stand last week?

A. No.

Q. At any time before you took the witness stand last week did anybody show you copies of your Mine-Mill vouchers?

A. No, sir.

Q. Before you testified before the Grand Jury in Denver did anybody show you copies of your Mine-Mill vouchers?

A. No, sir.

Q. Mr. Gardner, where did you go to school?

A. Oh, I went to a little country school near Galena, South Dakota, whenever it operated.

Q. How far did you get in school?

A. About the second grade, about that equivalent.

(Document marked Defendant's Exhibit J for identification.)

[fol. 669] Mr. Witt: If the Court please, I have shown this one page of the FBI material to Mr. Kelley which has been marked Defendant's Exhibit J for identification, and I now offer it in evidence.

Mr. Kelley: You are offering it in evidence?

Mr. Witt: Yes.

Mr. Kelley: The Government objects to this for the same reason that it is not, no foundation laid for its admission into evidence for any purpose at this point. If he wishes to use it for refreshing memory or something, that is one thing, but, unless it is shown that the witness has seen this and adopted it, we do not think it has any probative value.

The Court: What is the relevancy?

Mr. Witt: I want to show that he gave the FBI information different—

The Court: Well, ask him that.

Mr. Witt: Before Mr. Kelley suggested that I get it admitted in evidence first. I am trying to do as Mr. Kelley wants me to do.

Mr. Kelley: You were reading from it before.

Mr. Witt: There is one—

The Court: I do not see any basis shown here for offering it in evidence at all at the moment on the face of it.

Mr. Witt: Let me ask the witness this question if it is a question of foundation, but before I do with respect to Mr. Kelley's statements that in my foundation I haven't been showing that the witness has seen this or adopted it or approved it the mere fact that we have this indicates that it is a statement of the witness under Section 3500.

The Court: I am not ruling on that at the moment. I am simply ruling there is nothing that has been called to the Court's attention to make it even relevant.

[fol. 670] Mr. Witt: Let me ask the witness this question as further foundation.

Q. Mr. Gardner, didn't you tell the FBI in Butte that you had had seven years of elementary education?

A. No, sir, I have never told any Government agent. I often used the fact that I have got eight grades of schooling if I am applying for a job, and I have used that often, seven or eight grades.

Q. But you have never told the FBI that you had seven years of elementary education?

A. No, sir.

Mr. Witt: In view of that I offer Defendant's Exhibit J in evidence.

The Court: I think the offer will be refused at the moment without getting into a lengthy discussion of the situation here. I think this is hearsay on the face of it I think at the moment.

Mr. Witt: MayI be heard on that a moment?

The Court: I think you might as well go ahead. We will be taking a recess in 20 minutes, and it is not something to get involved in an argument about before the Jury.

Mr. Witt: I think we will have to stop on that. If we do not get this issue clarified, it will impede the rest of my examination.

The Court: I wish you would proceed if you can. I can tell if it comes in that category.

Mr. Witt: I have a fairly extensive cross examination prepared on the basis of our understanding of the admissibility of this FBI material in evidence, and it would be too disconcerting to try to revise it now in open court.

The Court: Well, I think I will reserve ruling on this, and you may proceed to your next question, and I can tell if it comes in the same category, until we have the recess at 11:00 o'clock.

Mr. Witt: I have my cross examination constructed in a certain way, your Honor.

[fol. 671] The Court: We will overrule the objection, and you may renew the question later after we discuss the matter. I will sustain the objection rather than overrule it.

Mr. Witt: As I said, your Honor, in view of that ruling I have great difficulty continuing with the course of my cross examination as I have outlined it.

The Court: If you will proceed.

Mr. Witt: Give me a moment, and I will see if I can go to something else.

The Court: You may proceed.

Mr. Witt: When are you intending to recess?

The Court: I am intending to recess at 11:00 o'clock.

Q. Mr. Gardner, in your testimony last week about this trip you made with Travis from Buffalo to Port Colborne and Welland I think you testified last week that your recollection is that it was in the fall of 1951?

A. Yes.

Q. You thought September or October?

A. Yes.

Q. Are you able to fix that date a little more exactly?

A. No. That is the best of my recollection.

Q. You testified that you met Travis in Buffalo on that occasion, is that right?

A. Yes, sir.

Q. Travis asked you to meet him in Buffalo?

A. No, it occurs to me the Cleveland Office had said that they had a call from Travis asking—I am not sure whether I did or not—it does occur to me now since it has been raised that I did have a call from Travis asking me to meet him in Buffalo. I would not be positive. Either that or the office

had told me that Travis had called. I just don't recall for sure how it was fixed.

Q. Do you recall whether it was the office or Travis himself?

A. I would rather think it was the office that set the meeting up.

Q. For some reason you would rather think it was the office?

A. Yes.

Q. What is your reason?

A. I don't remember talking to Travis on the phone until after I had met him.

[fol. 672] Q. When you say the office are you referring to the Mine-Mill Office in Cleveland?

A. Yes.

Q. And whom specifically are you referring to in the Cleveland office?

A. Well, the Board member in charge of that office.

Q. What was his name?

A. His name was Ray Dennis.

Q. Now, whether it was Ray Dennis who told you about meeting Travis in Buffalo or whether it was Travis on the long-distance phone do you recall whether you were told why you were wanted to go on that little trip with Travis?

A. Yes, yes.

Q. What was that?

A. I recall a discussion with the Board member there relative to my taking Travis across the border because of the difficulties he was having getting over the border.

Q. So, now, your recollection is that was definitely the Board member, Ray Dennis, who told you about meeting Travis and not Travis on the long-distance phone?

A. At least it was the Board member who gave me the instructions on the whys and wherefores of it.

Q. In the course of telling you that did Dennis tell you that Mine-Mill people, Mine-Mill officials had difficulty getting across the border?

A. Well, I recall him specifically saying the difficulties that Travis was having getting across the border, but, as I also recall, him telling me Jack Clark had no problem getting across the border.

Q. Did you know Jack Clark as a member of the Communist Party at that time?

A. No, sir, I did not.

Q. Did you ever know Jack Clark as a member of the Communist Party?

A. No, sir.

Q. Jack Clark was the President of the Union at that time, wasn't he?

A. Yes.

Q. When was it you came to work for Mine-Mill?

A. The latter part of August or early part of September, 1951

Q. Do you remember Ray Dennis telling you anything else about why you were wanted to meet Travis at the border?

A. Well, the essence of the thing was that I was to meet him to get him across the border because my car was not known on the border and neither was I known as a person who crossed the border, so, it was felt I could do the job easier than, for example, and that was specifically mentioned, the Buffalo staff member who is known at the border. [fol. 673] Q. Did Dennis tell you when he discussed that with you what Travis wanted to go into Canada for?

A. No, sir, I don't think so. I don't recall any discussion.

Q. Did he tell you Travis wanted to go to Canada on some Communist Party affair or escapade?

A. I don't recall any discussion as to the reasons for Travis going, just the fact that I was to get him across.

Q. Now, you testified that after you crossed the border into Canada you went to the home of the Business Agent of Port Colborne, is that right?

A. Yes.

Q. Do you remember his name, the name of the Business Agent?

A. It occurs to me it was Mike Kobenac, but I would not be too sure of that name. I am very unfamiliar with the Canadian staff.

Q. You also met Clark in Buffalo at the same time you met Travis?

A. Yes.

Q. And was there any discussion about Communist Party affairs or anything like that during the course of your drive with Clark and Travis from Buffalo to Port Colborne?

A. No, sir. Most of the discussion had to do with the crowded condition of the front seat of the little car.

Q. That was yours?

A. That was my little car.

Q. Your vintage Chevrolet?

A. That was it.

Q. And when—strike that, please. How long were you at the home of the Business Agent?

A. Well, I don't remember. My guess it would be a few hours, maybe four hours.

Q. Any Communist Party discussion there?

A. No, sir. I don't recall any Communist Party discussion there.

Q. Did you find out then or have you found out on any subsequent occasion that the Business Agent was a member of the Communist Party?

A. No, sir, I don't know him at all.

Q. Do you recall who it was aside from Travis and yourself who took the drive from Port Colborne to Welland?

A. No, sir, I don't.

Q. Was Clark along on that occasion?

A. Well, I don't think Clark was in our car. There were about four people in our car including Travis and myself, but I don't remember who else was along.

Q. Did the Business Agent go along?

A. I am sure the Business Agent was at the Welland meeting, but I don't know whether he was in that car or not. He might have driven it for all I remember.

[fol. 674] Q. You just referred to a Welland meeting. What kind of a meeting was that?

A. That was a staff meeting to the best of my knowledge of Mine-Mill Canadian staff.

Q. Now, Mr. Gardner, I want to get to your conversation with Mr. Travis on the way back to Buffalo, and I will ask you to be good enough to give us the substance of that conversation again.

A. Well, to the best of my recollection we first discussed

the fact that, well, he was telling me that I came to Mine-Mill well recommended from the Party in Cleveland, he was sure I would be happy in the setup, and that we would get along pretty well. We discussed the resignation, his public resignation from Mine-Mill, it was published in the Union paper and I presume other papers, and how he recognized that now as an error, because it gave the enemies of Mine-Mill an opportunity to see through the resignation as being not an actual resignation. We discussed the problems of getting across the border and how the Canadians was clamping down on the members of the Party in this country getting across the border. We discussed the fact that some of the unions were having no difficulties and to detail that conversation because they were the old line AFL and CIO unions who were apparently going along with the Government. That is the best of my recollection at the moment that we had any discussion.

Q. Mr. Gardner, after you began giving information to the FBI at any time thereafter until you took the witness stand here last week did you tell the FBI about this trip of yours from Buffalo to Canada with Travis and this discussion on the way back?

A. I don't suppose I did unless they asked me about it, and I don't remember them asking specifically about it although, again, I don't want to be too sure of that. I had a policy generally of answering their questions and telling them what they specifically asked me about, and I don't remember whether they ever asked me about that trip or not.

Q. You didn't give the FBI any information unless they asked you?

A. Well, generally that was it.

Q. Now, did the FBI ever indicate to you that they knew about this trip of yours to Canada with Travis without your telling them?

A. I can't recall them ever asking me about the trip at all.

Q. And you didn't ever volunteer any information to the FBI?

A. Not that I recall.

Q. In all your discussions with the FBI you never volun-

tegred any information? You simply answer their questions?

[fol. 675] Mr. Kelley: May it please the Court, I think that is irrelevant.

The Court: I think I will sustain the objection to the last question.

Mr. Witt: All right, if the Court please.

Q. Take the conversation you had with Travis at his home here in Denver in June of 1953, did you ever tell the FBI about that?

A. Not that I can specifically recall. I don't think they ever asked me about it that I can recall. If they did, I told them about it. I just don't remember them asking me about it.

Q. Did you ever give the FBI any information about your stopover here in Denver in June of '53?

A. Yes, I think I was asked about it once. Here, again, I am just not too sure, but I vaguely remember some question about coming to Denver.

Q. All right, what do you vaguely remember telling the FBI about that stopover in Denver?

A. Well, I remember they were asking me specifically about some person here in Denver.

Q. What person was that?

A. Harold Sanderson.

Q. All right, what else?

A. And whatever they asked me I told them. I don't remember what it was specifically.

Q. What else did you tell them aside from telling them about Harold Sanderson?

A. I don't remember.

Q. I will ask you again whether you told them anything about Travis in connection with that stopover in Denver in June of '53.

A. I don't remember whether I did or not. I don't recall telling them, but I could have.

Q. Is it possible that you told them that you stayed at Travis's that night?

A. Yes, it is possible, but I don't remember whether they went into that or not.

Q. They didn't ask you when you got to Denver?

A. I don't know. I don't remember. All I remember about the request on the Denver thing that I can specifically recall is that they were specifically asking me about Harold Sanderson, and I don't recall them asking me about anybody else in Denver, and I think that my answers would probably have been around Harold Sanderson.

Q. When was it that you answered those questions of the FBI about Harold Sanderson in connection with your stopover in Denver in June of 1953?

A. I stopped over in Denver in the early part of June of [fol. 676] 1953, and I would not know when they asked me about it. As I understand, that is your question, when did the FBI ask me about Sanderson.

Q. Yes.

A. I don't recall when it was.

Q. Where was it that you talked to the FBI?

A. Butte.

Q. That would have been sometime in '56?

A. I am not too sure when it was. There were several conferences, and they ran into late '56, and I don't remember which specific conference it was that they were talking about Harold Sanderson.

Q. But you are sure it was in Butte?

A. Yes. I don't remember meeting the FBI any place else.

Q. Do you recall when is the last time you gave the FBI any information about Harold Sanderson?

A. Well, I imagine that would be the last time. I don't recall them ever asking me about that again.

Q. When you say that would be the last time can you fix the last time?

A. No, I can't. It was one of the conferences in Butte in which the question of Harold Sanderson came up.

Q. When was the last time you talked to the FBI in Butte about Travis or Mine-Mill or Harold Sanderson?

A. Oh, gee, I don't remember when it would be. It might be in the middle, maybe the late summer of '56, and I don't remember talking about Travis. I just don't remember the FBI ever asking me about Travis.

Q. You don't recall giving the FBI any information about Travis, is that right?

A. Well, I don't offhand. I don't recall it. It is entirely possible, because they asked me about a lot of people.

Q. In Mine-Mill?

A. Yes, in Mine-Mill. Wait a minute, in Mine-Mill, I don't think they asked me about many in Mine-Mill. They asked me a lot about UE.

Q. Just take Mine-Mill. You said they asked you about Harold Sanderson, is that right?

A. Yes.

Q. They asked you about Ray Dennis, is that right?

Mr. Vincent: The Government objects to that.

Mr. Kelley: May it please the Court—

Mr. Witt: I am laying a foundation for impeachment. This is the he of this man's testimony.

[fol. 677] The Court: You will have to establish some relevancy between this and the case, because his statements about something entirely detached from this case would not be relevant at all either on impeachment or anything. It has to be on something that has something to do with this matter and investigation.

Mr. Witt: Your Honor, I would like to argue that. I think that is quite important.

The Court: It is 11:00 o'clock. We will have a recess now, and the Jury will bear in mind the admonitions I have given about discussing the case and so forth. You may announce a recess.

* * * * * * *

[fol. 678] In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL RE SCOPE OF SECTION 3500 AND PROCEDURE

Mr. Kelley: We would like the record to show that all the Government lawyers and Mr. DeCook are in Chambers during this recess.

Mr. Witt: That is not necessary.

Mr. Kelley: I think it is necessary in view of the remarks and request of counsel.

The Court: The record may so show. What is it that you wish to point out?

Mr. Witt: The two issues we have as a result of this morning's cross examination. As I understand them, one, the admissibility in evidence of the FBI statement which we have pursuant to Section 3500 without any further foundation, and, two, this line of interrogation I was just pursuing with the witness. Taking the first one, your Honor, if I understood Mr. Kelley the two times he made the objection about the admissibility of the FBI statements in open court this morning, he was arguing that these were not statements of the witness. Now, I have two things to say about that. One is that the mere fact that those have been produced by the prosecution and handed over to the defense makes them by definition statements of the witness without any further foundation in view of the definition of "statements" in Section 3500. Two, I thought with respect to the witness Eckert we had cleared this hurdle and it was established that any of those could go into evidence any time we felt we wanted to.

The Court: First, I want to get the Government's position about the first point you raise, and that is with respect to whether at this stage of the proceeding there has to be some showing that they are the statements of the witness. Now, as I pointed out yesterday, it is corollary to what we talked about Saturday, rather, it wasn't yesterday, the [fol. 679] Government was required to produce statements which came within the category and definition as provided by 3500, Title 18, and the Government produced this particular statement. Now, it is my notion that where the Government has produced the statement, why, they have conceded in effect that it is a statement within the meaning of 3500. Now, what have you to say about that?

Mr. Kelley: That is not our understanding, and it is not the premise that we produced these on, your Honor. We conceived it our duty to produce any documents in our files which related to the testimony of the witness on direct examination, and we further felt that it was for the Court to decide whether or not they were statements within the terms of the statute.

The Court: Where is there anything in the statute that would indicate that?

Mr. Kelley: Well, we have one of the first cases of any significance that has been tried under this. There is very little law to go on, and in an effort to not commit any error and to be absolutely fair on the thing we have produced things which we feel have no standing as statements under the Act, because they are on the face, they show they were not contemporaneously recorded, and it is our feeling that in general that FBI reports are hearsay and that, if a strict interpretation of the statute is given, that all the Government would be required to produce would be signed statements or statements written out, reports written out by the witness and handed to an Agent which he of necessity would adopt or statements which the Agent has prepared as a result of an interview and has submitted back to the witness and asked if that reflected the substance of the interview, something like that would be the only type of thing that would come within the definition of the terms of the statute, Section 3500. We have not proceeded to this point on the assumption that everything we produced was a statement.

The Court: Well, the statute itself I again repeat, as I read it Saturday in detail and for the record, and, of course, it stands for itself, I thought rather expressly said the things that the United States should produce were the things that amounted to statement within the statute. Isn't that what it says?

[fol. 680] Mr. Kelley: I think that is what it says, your Honor. I think probably, your Honor, this is almost a case of first impression, at least it is the first one that involved the problems that we have here in this District, and we are feeling our way along on it, and I think I made the statement in reference to Eckert's documents and things that were submitted that we did not concede that those were contemporaneously recorded, that they were substantially verbatim, and a number of other things that would qualify them for statements.

The Court: That fact is a matter that is peculiar within the knowledge of the Government. By what process or upon what basis would the Court determine what amounted to a

statement where these questions would be involved collaterally? If you bring in something and say to the Court, "Here is the statement we are producing under 3500," that in itself would admit it seems to me that the statement was one within the category of 3500 and producible under that, and then the only question, as I pointed out, as I see it remaining for the Court to determine, is whether the statement that you produced, which was a statement in fact under the provisions of 3500, contained matter which did not pertain to the direct examination of the witness and that the Court's duty was to excise matters that were not included in that category, and, of course, the assumption was when the Government said, "Here is a statement," that it would come within one of the definitions of "statement" contained there in that last section. Otherwise, I pose the question, how could the Court determine whether it was contemporaneously made or all of those other factors or submitted to the witness and approved by him, what process would the Court follow to determine that?

Mr. Kelley: Your Honor, I am not saying that your interpretation of this statute and the procedure is not correct. I am stating that the Government proceeded on a different interpretation of it and that matters which have gotten in or have been delivered to the defense are matters which are hearsay and have no proper—well, let me state it this way: They are not properly admissible in evidence because of the hearsay nature. You have got to assume, to follow out a theory that they are admissible per se, that everything that a witness says to an agent is correctly recorded and that FBI agents are infallible and not subject to human frailties, when they don't make a report for a week or two [fol. 681] weeks or even a month after an interview, and we have taken the position that even if they were not contemporaneously recorded, that we would not, strictly speaking, that we would not attempt to draw the line as to when they were contemporaneously recorded. It is apparent on the face of many of them that they don't purport to be verbatim or substantially verbatim reports, but, again, we have submitted them to the Court.

The Court: Where do you find anything within the framework of the statute or the theory of the statute that calls

upon the Court where you have produced the material to determine after you have produced it whether it constitutes a statement or not? By what process could the Court determine that? It says they are to be examined in camera which implies right on the face of it that the examination has to be made on the basis of what is submitted without reference to any other collateral hearings or talks or anything else with anyone. How would the Court know whether the witness had seen the statement and approved of it or all of those factors? There may have been a literal verbatim transcript for all the Court knows. If you brought it in here and said, "Here are statements that we are required to furnish under 3500," why, by what process would the Court then ascertain that it wasn't a statement under 3500 after you have branded it as such by bringing it in?

Mr. Kelley: Well, as I say, I cannot disagree with your reasoning, but that we proceeded on the other premise, the premise I have tried to explain, and the mere fact that we have produced them it doesn't seem to me that that cloaks them with any greater value than they show they have on their face.

The Court: Well, in reference to the Congressional history of this particular 3500 as far as my study takes me, that the very reason that the Congress defined "statement" as they did was to eliminate the things that come within the hearsay rule you are talking about, and that was done by definition, and, as I say, when you come in and give the Court something and say, "Here are the statements that we are obliged to produce under 3500, we object to submitting them in their entirety to the defense for the one reason that they contain matters which are not within the scope of the direct examination of the witness, and, therefore, we ask the Court to look them over in camera and to excise from the [fol. 682] statements we have offered the matters which we say are not pertinent within the scope of the direct examination, and, therefore, we wish you to do that and submit the rest to the defense," that is what you have said to me. There is no place along the line that the Court can determine whether these are statements or whether they are statements on the basis of the submission. So, I think they are entitled to use this statement that has been furnished them

as being a statement and therefore being the basis for impeachment, and I think I will overrule that objection that I sustained a moment ago which I did for the basis of having this discussion.

But I want to say one other thing which is merely cautionary in a way, that to make these things relevant from an evidentiary standpoint there must appear to be some contradiction, there must appear to be some deviation at least that would go to the credibility of the witness. Now, this one particular here I gather it does to this extent: that I think he testified on cross examination that he had gone to school for a certain length of time, and I think the report shows that he had seven years elementary education. That would come within the rule. But I think there has been a tendency, for instance, and I am not passing on the thing because I am not on the Jury, but the testimony that you read out of this trial in Cleveland, for example, I didn't observe anything contradictory about that. I may be mistaken, and that is a matter of argument for the Jury. But I am using that to point up what I mean, that it is going to have to be, whenever you offer this statement or part of it, it is going to have to be something that reflects on his credibility or his contradictory statement.

Mr. Witt: I agree with that. That is all I am trying to do. I think your Honor is mistaken about this Cleveland testimony.

The Court: I am just using that illustratively. I didn't immediately get the contradiction.

Mr. Witt: In that connection it is important for me, your Honor, because I do have difficulty in court, with all due respect may I suggest your Honor is perhaps a trifle impatient in court at those points.

[Vol. 683] The Court: I try not to be.

Mr. Witt: I am not saying it at all. I think your Honor is conducting a fine trial under terrible difficulties, but we are conducting the defense under serious difficulties too, and this stuff takes time, your Honor, and I am in the habit, and it may be my fault, perhaps it is, of trying to make the record as complete as possible. As I have said in connection with use of prior transcripts, I try to give the continuity. So, sometimes it takes a little more time and re-

quires a little more of the witness's prior testimony.

The Court: The next thing, the thoroughly practical problem, for instance, take this very specific case that we have before us on this question, should the whole page or the whole statement or just the contradictory part be received in evidence? My offhand impression is that the way to handle it best, he has testified that he did not make the statement to the FBI, that is, about the elementary education, my own impression is that the easiest way to keep the record straight would be to read from this statement. It is not in evidence, but that the statement reads as follows. I don't know how the mechanics should be handled, whether to let the whole statement in or not.

Mr. Kelley: I think the whole statement should go in. If any part goes in, the whole is admissible, because all it will require us to do would be to offer the balance of it on redirect. If they offer part of the statement, why, the whole thing is admissible. That is my understanding of the rules of evidence.

The Court: What do you think?

Mr. Witt: Oh, no, your Honor, I feel very strongly about it, and I am glad your Honor came back to this. Take this particular reference your Honor just made to that page containing the statement about his education. That takes only one sentence on that page, and obviously, that is the only reason I am using that page for impeachment. Now, it doesn't follow that simply because we used that sentence for purposes of impeachment that everything else on the page goes in, your Honor. Otherwise, the whole thing would be—

The Court: But—

[fol. 684] Mr. Witt: Let me say this from the practical point of view, no other point of view, I think there are other serious objections, the thing would be intolerable. Mr. Kelley's argument would also go to his testimony in Cleveland, that if I want to use one answer to one question on one page, Mr. Kelley's reasoning is we put the whole three volumes in on everything in the Cleveland case.

The Court: I adhere to your point of view, but I am trying to work out the mechanics of it. But because some place

along the line they are going to have to have some establishment of the source—

Mr. Witt: Yes.

The Court: To show what I mean, what is I think the practical problem, it is perfectly simple, the transcript, the authenticity of which is conceded, to ask the witness if he didn't make the following answer to that question, to read that, and he says he didn't, why, then, of course, you have a right to then offer the thing he did say in evidence for the purpose of contradicting him and that one sentence and one answer, not the whole record, that one sentence and one answer. To illustrate Mr. Kelley's objection and I think the limitation of it, if on redirect there is some other question or answer that qualifies this specific thing, you might have a right to bring that in, but you could not bring in the whole transcript.

Mr. Witt: I agree with that.

The Court: That is certain. But what I am trying to figure out here is where, by what process we can get this transcript into the category, say, of a transcript of evidence.

Mr. Witt: All right, your Honor, it occurs to me, may I just answer that question, because I am handling this and it is important to expedite the cross examination and not get into these problems? Take the two matters that came up this morning with respect to these FBI documents, in both cases that could have been read into the record without the whole page being offered very easily. With respect to the first matter all I was doing was establishing the date or dates when he first talked to the FBI. I do not think there is anything else on that page anyway. It doesn't matter. [fol. 685] With respect to the second matter, his statement about the elementary school education on that page, the rest of that page deals with other biographical material, as I recall it, but it doesn't matter. I think the simplest thing to do is to read the particular part which we are seeking to use for impeachment, and in this particular case just that sentence about his elementary school education.

Mr. Vincent: Might I say something on this, on this whole problem, that the Government at no time has conceded and does not concede that the documents produced to

the Court which in turn had been ordered to be produced to the defendant are statements within the statute.

The Court: I doubt that you did not concede that when you produced them.

Mr. Vincent: That is not our position. It is our position that we don't concede. Might we say in regard to producing them in evidence and using them that on its face the document that Mr. Witt was attempting to use this morning is a document written by a person other than the witness.

The Court: I don't know whether it is or not.

Mr. Vincent: It appears right on the face of the document, your Honor.

The Court: It doesn't to me. Let's not get into that, because I have held this: that any document that the Government produced and submitted to the Court as a statement of the witness comes within the definition of 3500 and that the Court's duty with respect to it solely then is to excise the portions that were not relevant, and, so, I don't want to get into any argument about whether it is a statement or it is not a statement.

Mr. Vincent: I didn't want to argue with your Honor, but I wanted something for the record on that. I might point out that this problem has come up in other jurisdictions, and I am thinking especially of the Eastern District of New York in Brooklyn, also in Louisiana and Missouri, and the Government practicing or following what we have been doing here has produced in the court, at least produced these reports and pointed out why in the Government's [fol. 686] opinion these should not be produced to the defendant, not to the Court, and the Court has taken the position that they could—

The Court: Have you any cases that hold that way?

Mr. Vincent: I do not have a case that is reported, your Honor, but I can quote an example in the Abel case in the Eastern District of New York. That was that espionage case in Brooklyn. The Government in that trial had some fragmentary notes made by a special agent of the Bureau. They produced those to the Court in camera, and the Court held that they were not substantially verbatim because of their nature, they were fragmentary, and, therefore, the Government could not produce.

The Court: I do not know how that came up. I want to see some case where you have come in and produced under 3500 and then that the Court on his own initiative in camera proceeding said, "This is not a statement, and, therefore, you need not produce that." I want to see a case like that, because the more I think about it the more impossible it becomes.

Mr. Vincent: I do not have it in writing, but I believe that was the procedure at least followed in part in Cleveland—Mr. Witt may know about that, that reports were shown to the Judge.

The Court: I can see an entirely different situation. You brought to me I think Saturday that case in New York or, no, in Washington the Court of Appeals which involved this security business, what is the title of the case?

Mr. Vincent: The title of that case is The Communist Party of America vs. the Subversive Activities Control Board, and that is in the Court of Appeals in the District of Columbia.

The Court: What I understand happened in that case was that while the witness was on the stand—my memory isn't too sharp—but I know in one instance it was, now, I read that the other day, that the witness on the stand was asked, "Did you ever tell this to the FBI," something about some matter, and the witness said, "I am sure I did." That happened in two instances, something substantially like that. The defense then demanded the production of the FBI [fol. 687] file or the records or whatever report this man made to the FBI. The objection was made that it was hearsay, that it, therefore, could not be used for impeachment purposes, because on the witness's own statement that the matter had been, if it was recorded had been recorded with some FBI Agent or the witness, himself, had never made a written statement on it and had never seen whatever it was recorded if anything afterwards. The court on the basis that, or the Commission I guess it was, on the basis that would be hearsay said it need not be produced to begin with. That wasn't one where they demanded it and the Government came in and said, "We have it." The Government was opposing all the time on the basis it wasn't a statement in

that sense. That wasn't the specific objection. In the course of the opinion the Court of Appeals pointed out, upheld that decision, and said even under the Criminal Code and referring to 3500 that the Government was under no obligation to produce a statement unless it came within the definition of 3500 which seems to be entirely consistent with what my view is and entirely consistent with what I have been doing here.

Mr. Vincent: I think it is more or less consistent in a sense with our own position, your Honor, but the Government was resisting production to the defendant primarily, not so much resisting production to the Court or to the Commissioner, because the Government had felt that the Commissioner or the Court could listen to the Government's position and then make a ruling on that.

The Court: Let me ask you one thing, it looks so simple to me, how in the world or by what process could the Court determine from the face of one of those instruments whether it was a statement or whether it wasn't without taking evidence?

Mr. Vincent: On some of the reports, your Honor, it is I would say obvious from its very face.

The Court: I do not follow you. It is not obvious from its very face after the thing was made it wasn't submitted to the witness and he approved it.

Mr. Vincent: Your Honor, I will take the report that Mr. Witt—

The Court: Take this very one we are talking about now. [fol. 688] Mr. Vincent: On the face of that you will notice the date of that report is October 7, 1955, and in the body on the first page of that report it states that the witness was interviewed on August 31 and September 9. Now, on its face you have more than a 30 days lapse between the interview when the witness talked to these Agents and when the report was written.

The Court: That doesn't establish a thing except by the lightest inference in my mind. For all I know they might have sat down and written out the report in its exact form right at the time. I don't know about the thing. That is the point I am making.

Mr. Vincent: We have to take the date the report was made, and, if we take the date as made and the date of the interview, we say it is not contemporaneously recorded.

The Court: I don't know. But I have ruled on that. On this other I expect the best way to do is to simply say that you are reading from this report that was submitted by the Government under Rule 3500 on page one and so forth or whatever designation there is.

Mr. Witt: All right, sir.

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[fol. 696] Mr. Kelley: The thing that bothers me, your Honor, I think I can illustrate it by this: Mr. Witt asks the witness when he first talked to the FBI, not about this case but first talked to them. Then he uses the testimony on another trial when they were talking about another subject matter to find out when he talked to the FBI in this case. Then he uses the date on which a report is made in this case which is the first report that relates to his testimony here, and you are using it in an attempt to impeach when the things are not necessarily inconsistent at all, so, that is the reason I feel that I have got to be in a position to object to the use of this stuff and not concede that it all goes, that just because we tendered it that it goes into evidence automatically or that he can use it automatically. It doesn't. Just to take the illustration that I have given, if he asks the witness a question on interrogation the witness has answered a certain way, and he conceives that some statement in here is contradictory or inconsistent with it. Then, he says, "I wish to read and offer in evidence the following sentence from page three or page five or whatever it may be of this material."

The Court: Then, you get up and say, "Well, I object to that, because there is no inconsistency or something like that." The Court will rule on it.

Mr. Kelley: We still have our objections as to relevancy and consistency and that sort of thing.

Mr. Witt: Oh, yes.

The Court: The vice to this other method under our theory before they could, just take this specific thing that we have been over, if he offers this whole page, why, 95 [fol. 697] percent of it as far as I know at the moment

would not even be relevant, and it would amount in the first instance to going in there and saying, "We offer the whole matter in evidence." That means it goes before the Jury. Probably 95 percent of it is irrelevant. There may be something in there that we would not want the Jury to see, so, we cannot do it on the basis of offering the whole thing. I think, if we proceed on the basis that I have indicated, and that is this as I understand: that the first thing we will do, you gentlemen get together and number these sheets consecutively on the back page with a red pencil in this Gardner statement, and from here on he will refer to them by the arbitrary page number and offer the portion that he thinks proper in evidence on that basis, and that I think we should have lodged so we won't get things mixed up with the thing. I think you should get the Eckert transcript that was furnished to them or this matter here and also another copy of this and put it in the record here in this case that these were, you can identify them, you can identify them however you wish to, as Exhibit 1 or 2 or something so we won't get confused with the trial exhibit, the matter that you have exhibited to them or produced to defense counsel.

Mr. Kelley: Would not a statement attached to it that these are the excised copies of reports of witness so-and-so which were furnished to the defendant—

Mr. Witt: Why don't we get together and not take your Honor's time on the rest of the problem?

The Court: I think that will keep away from difficulty on the thing.

Mr. Witt: Just to clean up two things which have now arisen.

In this last statement of Mr. Kelley's about my using the witness' testimony in Cleveland—

The Court: I think that is water under the bridge, because the witness, the witness after you refreshed his recollection, for instance, like on the date that was on the report, he said the date on the report coincided with the testimony. That is for the Jury. Then, on this other stuff I said a moment ago I didn't see any or very much of an inconsistency in that, there may be, but that is a matter of argument for the Jury on that.

Mr. Witt: But since Mr. Kelley doesn't have a copy of it, [fol. 698] of his testimony in Cleveland we will be glad to give him ours for his redirect any time he wants it.

The Court: All right.

Mr. Witt: One other thing came up that was incidental to this discussion, came up a little earlier. Perhaps I was wrong about this, but, as I understood something Mr. Vincent said, he said he showed your Honor this decision of the Court of Appeals in the District of Columbia in the case of The Communist Party against the SCAB. I am not suggesting any slightest impropriety.

The Court: Just so there will be no question about the record, why, you will recall the other day here in a conference I asked something about that case, and all that happened was without any comments or anything else one day Mr. Vincent—it was Saturday—brought me down that copy and just handed it to me. There was no argument or comments or anything else, and I had mentioned, you may recall it, that I had seen a little about the case in that Law Week, but I had not seen the opinion, and he just gave it to me. There wasn't any argument or anything else.

Mr. Witt: I didn't think so. That is why I was making my preliminary statement. If at any time your Honor is interested in discussing that case and its relevance to our problems under Section 3500, we will be happy to discuss it.

The Court: I just mentioned it because he just brought it down more or less pursuant to my request I would like to see the opinion. I never even commented on it.

Mr. Witt: I have another matter pending. This last problem we ran into with the witness that I asked your Honor for an opportunity to discuss in Chambers.

The Court: You mean about asking about other names? You can tell me what you think about that, but I do not see any relevancy at all.

Mr. Witt: Let me tell you what I am thinking, and we will be finished.

The Court: All right.

[fol. 699] Mr. Witt: If I followed the witness' answers to my questions, he said he doesn't recall talking to the FBI about Travis. He has already testified that he has talked to the FBI about Sanderson. The transcript of his

testimony in the Cleveland case indicates that he gave testimony about Ray Dennis whom he has already—

The Court: But where does that have any relevancy or anything to do with this case?

Mr. Witt: Just let me make my record, if you will. —who he has testified as being the Executive Board member of District 3 which was the district he was working in when he was in Cleveland. He has also testified he gave testimony before the Grand Jury here in Denver, and that Mr. Kelley will agree to, in connection with a conspiracy case, so, it is fair to conclude in view of what he has now said about talking with the FBI about Sanderson, who is a defendant in the conspiracy case, that he testified about Sanderson before the Grand Jury. I also conclude in view of what he said about his testimony in the Cleveland case that he gave testimony before the Grand Jury about Ray Dennis who is also a defendant in the conspiracy case. This is the conspiracy case pending before your Honor.

Since this man was in Butte at the time Graham Dolan was there, I draw the inference that, since Dolan is also a defendant in the conspiracy case, that this man gave testimony about Dolan before the Grand Jury. Finally in light of the fact that this man has now given testimony in open court here about Travis, I just think it is incredible that he never talked to the FBI about Travis. What I want to do is take him down the list of the defendants in the conspiracy case and see whether he remembers talking to the FBI or giving testimony before the Grand Jury about others of the 13 defendants in the conspiracy case, but he has no recollection about talking to the FBI or giving testimony before the Grand Jury about Travis, and I think I should be allowed to take him down through the other 13 names.

The Court: There is no relevancy between that case and this case. I mean Mr. Travis is the defendant on trial here. The other gentlemen you have mentioned are defendants in the other case, and that might be relevant in the other case, but it has no relevancy here unless it connects up in some way with this case. Whether this Sanderson business connects up with this case, he testified here on

[fol. 700] direct that he came to Denver and that among his purposes was to talk to Sanderson. Well, he has testified with respect to what he did here in Denver, and that testimony along that line may be relevant, but what he told about somebody else in an absolutely defached situation in this case, I cannot see it is relevant at all.

Mr. Witt: It is much like all the problems we had with this man Eckert, and this I think is even more acute and gives us a basis for trying to impeach the man about having no recollection about talking to the FBI about Travis. This is a case where, an occasion in giving a statement to the FBI or giving testimony before the Grand Jury in light of the fact that he has taken the witness stand here now against Travis, testimony that he did not talk to the FBI or did not testify before the Grand Jury or he doesn't remember talking to the FBI or testifying before the Grand Jury about Travis we think would tend to impeachment.

The Court: Well, that is about what—that would not make material or relevant whether he talked about Jim Smith or Joe Doaks or somebody else. That is the point I am making.

Mr. Witt: Perhaps I haven't made myself clear. If he did talk to the FBI and did testify before the Grand Jury about all or some of the 13 defendants in the conspiracy case, it tends to undermine his testimony that he didn't or doesn't remember talking to the FBI or giving testimony before the Grand Jury about Travis.

The Court: I think we would be out in most collateral and wide open field just as to whether he discussed some other person. Unless there is some relevancy to this case. I do not think it is proper.

Mr. Witt: I think my question, which is a pending question, now comes in a different category, because he gave testimony about the Buffalo-Canadian incident. I had him on cross examination because Mr. Kelley didn't go into it, and in the course of rounding out he said it was Ray Dennis who talked to him in Cleveland about going into Buffalo.

The Court: You have already asked him if there was [fol. 701] any conversation, and if he talked with them about this Buffalo conversation, but assuming, just taking your own situation as illustration, if at some other time or in

connection with something else he had mentioned something Dennis did in Los Angeles or New York City or Washington, D.C., why there would not be any relevance to that.

Mr. Witt: I agree with that. I do not intend to ask him anything about any of these people except perhaps Sanderson except whether he talked to the FBI about them or gave testimony before the Grand Jury, and then I won't pursue it any more.

The Court: Then it would immediately open up this thing, and then the next question would be if he said he didn't talk to them you would be engaged in trying to prove that he did talk to them, and that would be wholly collateral.

Mr. Witt: I had no intention this morning and I have no such intention now.

The Court: No. The record is broad enough the way it is. I will sustain the objection unless you can show specifically something that would bring it within the subject matter of his direct examination.

Mr. Witt: I follow your Honor. This I think goes to his credibility, this line. That is the basis for it.

The Court: I do not agree with that.

Mr. Witt: I think I have made myself as clear as I want to.

Mr. Witt: May I talk to Mr. Kelley a moment? We will clarify these exhibits in the record.

If the Court please, before proceeding with further cross examination of the witness, we thought we should clarify the record with respect to the use in open court of the statements pursuant to Section 3500. I have discussed it with Mr. Kelley, and pursuant to the discussion in chambers may the record—

The Court: I think I can probably correct it. The jury will recall that shortly before we recessed at noon, coun-[fol. 702] sel for the defense asked a question relative to the elementary education of the witness, and with reference to a statement made by the witness with respect thereto. At that time I sustained the Government's objection to answering the question. I since have considered that the question may properly be asked and answered, and you may proceed on that basis.

Mr. Witt: Thank you, if the Court please. With respect to that point Your Honor just made, that material in the Section 3500 statements appears in what has been marked Defendant's Exhibit J for identification, being now page 8 of the numbering we have agreed upon in chambers, so at this time I ask the Court's permission to withdraw Defendant's Exhibit J for identification and will read into the record that one sentence on the point.

The Court: Then you wish to offer this sentence in evidence and to read it into the record?

Mr. Witt: Yes, sir.

The Court: Very well.

Mr. Witt: Under heading, "Education." "Gardner completed about seven years of elementary education."

The Court: Very well.

Mr. Witt: Now, with respect to the other page of this material, that was marked Defendant's Exhibit I this morning, and I believe that was admitted by ruling of the Court over objection. At this time I ask permission to withdraw that exhibit and instead read the sentence. It is not quite a sentence; it ends with a colon, which appears on that page, that now being page No. 7, pursuant to the numbering system we agreed upon in chambers.

Mr. Kelley: May it please the Court, in view of the fact that Mr. Witt has examined him with reference to when he first talked to the FBI in connection with this Exhibit I, it seems to me that the exhibit should not be withdrawn and it should be left in, or else he should read the heading about which he has cross examined him.

[fol. 703] Mr. Witt: I will do it either way Your Honor directs.

The Court: I think probably we better leave it the way it was with respect to that transaction, because you examined him at length about that and he looked at the sentence you are talking about and mentioned the matter of reconciliation, and with that statement with his testimony to the jury.

Mr. Witt: All right, thank you, Your Honor. Now, one other preliminary matter, if I may, just to clear up the record. Also just shortly before the noon recess, although it may have been earlier, I forget, I asked one or two questions about people other than the defendant whom

the witness talked to the FBI about. I asked him about Sanderson and he answered that. Then I asked him about others. Then there was an objection. Then Your Honor either sustained it or was inclined to sustain it.

The Court: That objection will be sustained.

Mr. Witt: In connection with that, Your Honor, I simply want to complete the record from our point of view and make a short offer to prove.

The Court: The offer ought to be made in the presence of the jury or out of the presence of the jury?

Mr. Kelley: I should think it would be made out of the presence of the jury, Your Honor.

The Court: I should think so, and you can make the offer the first time we have a recess.

Mr. Witt: All right, sir. I am about to ask the witness other questions along this line, but about the defendant Travis, so I hope I won't be transgressing on Your Honor's ruling.

The Court: You ask the question.

Mr. Witt: All right, sir.

[fol. 704] Fred Gardner, resumed the stand and testified further as follows:

Cross examination.

By Mr. Witt (Continued):

Q. Mr. Gardner, do you have any recollection as to when the first trial of Mr. Travis took place in this case?

A. I have a vague recollection.

Q. What is your recollection of it?

A. It would be in '55.

Q. Any recollection as to the month or months of '55?

A. No.

Q. Now, do you have any recollection as to whether or not you had given information to the FBI of any kind before the first trial of Travis?

A. Well, not to my recollection. At least there is nothing that I have ever given that would indicate that I gave it prior or during the first trial.

Q. Then just to make sure, Mr. Gardner, I will ask you this: Do you have any recollection about the FBI's talking to you about Travis before?

A. No.

Q. Let me finish my question. —before Travis' first trial?

A. No, sir.

Q. Do you have any recollection that the FBI or any Government attorney or anybody else representing the Department of Justice asked you whether you would testify against Travis on his first trial?

A. No, sir. The first time that question was asked me was about a week ago.

Q. Well, in view of that answer, Mr. Gardner, then about a week ago you were asked whether you would testify in this trial, is that it?

A. Yes, sir.

Q. Now, in connection with your appearance before the grand jury in Denver that we spoke about this morning when you appeared before the grand jury on that occasion in this court, did you give any testimony about Travis?

Mr. Kelley: The Government objects to that as being irrelevant.

The Court: I will sustain the objection.

Q. Now, Mr. Gardner, you remember being asked questions in Cleveland when you testified there the week before last about your having given information to the FBI? I asked you about that this morning?

A. Yes.

[fol. 705] Mr. Vincent: If Your Honor please, the Government objects to that; that is improper.

The Court: I will sustain the objection unless it is—

Mr. Witt: Preliminary.

The Court: —unless it is directed to something that would pertain to this trial. If he was asked in Cleveland and if he gave information to the FBI about some specific matter there under investigation and he hasn't testified to the same subject here, it would be entirely irrelevant.

Mr. Witt: Well, Your Honor, this is preliminary. I just wanted to complete the record I started to make this morn-

ing on his recollection on talking to the FBI about anything, just fix the dates, that's all I am interested in. Then I want to narrow it to what he testified to on direct in this trial.

The Court: He may have talked with the FBI twenty years ago about a post office robbery, for example; that would have no more connection with this case than anything you could possibly conceive. There has to be something developed here that would show that the subject of the testimony was the same as here, because the purpose, of course, is to go to the weight to be given his testimony here, and the testimony you are talking about has to relate to something that he has testified to on direct examination.

Mr. Witt: All right, Your Honor. I will have to ask one or two preliminary questions, but I am following Your Honor's ruling, I hope.

The Court: All right.

By Mr. Witt:

Q. Mr. Gardner, where are you living at the moment?

A. In Anchorage, Alaska.

Q. And you are there in connection with your work for the hod carriers?

A. Yes, sir.

Q. Did you furnish information to the FBI in Anchorage, Alaska at any time within recent months?

Mr. Kelley: The Government objects to that as having no materiality.

[fol. 706] Mr. Witt: I didn't want to make the question too complicated.

The Court: That may be a preliminary question.

Mr. Witt: I thought we would make it simpler; it is preliminary.

The Court: About what?

Mr. Witt: I am coming to it.

The Court: I think I will sustain the objection then; if you can point it up, you may.

Q. At any time within recent months since you have been in Anchorage, Mr. Gardner, have you given any information to the FBI about Travis?

A. No, sir, not that I recall, none at all.

Q. When did you go to Anchorage?
A. I believe it was last July.
Q. That's July of '57?
A. Yes.
Q. At any time since you have been in Anchorage did you give the FBI any information about Mine-Mill?

Mr. Kelley: I think that's irrelevant; he has answered that he gave none about the defendant, and I think it is irrelevant.

The Court: I think I will sustain the objection.

Mr. Witt: This is impeachment. I want to narrow it down. All right, Your Honor, I won't argue the point.

By Mr. Witt:

Q. At any time since you have been in Anchorage have you given the FBI any information about Harold Sanderson?

Mr. Crandall: The Government objects to that, Your Honor. We don't see the relevancy in this case.

The Court: I don't see the relevancy of that at all. Mr. Sanderson's name was brought in here because of the witness on testimony on direct examination. He saw Mr. [fol. 707] Sanderson in Denver, and I don't see how any conversation with anyone would have any relevancy to that unless it is tied to this Denver transaction.

Mr. Witt: It is.

The Court: And the breadth of the question is such that it might relate to something else. If you wish to ask him about the conversation, a specific conversation in Denver or something like that, why, you might do that, but I will sustain the objection to the question in the present form.

Q. Mr. Gardner, at any time since you began to give the FBI information did you give the FBI any information relating to your seeing Sanderson or talking to him when you stopped in Denver in June of 1953?

The Court: I think he has answered that question this morning; I am sure he did.

Mr. Witt: I don't remember.
Mr. Kelley: Yes, he did.
Mr. Witt: What was his answer?
The Court: I am telling you for the record. I won't attempt to give it, but you asked several questions about that.

By Mr. Witt:

Q. All right; now, in talking to the FBI about Sanderson and seeing him here in Denver, did you tell the FBI what you and Sanderson talked about?

Mr. Kelley: May it please the Court, I think he is approaching it in a way we have agreed isn't proper. If he has a specific report that has an inconsistent statement in it he is to ask him about that.
The Court: I think that's true.
Mr. Witt: I thought I would ask him a preliminary question first.
The Court: If I am wrong we can stop and look at the [fol. 708] record if there is any question about it. I think the witness testified this morning that he had a conversation with Mr. Sanderson here in Denver and that the FBI interrogated him about his meeting with Sanderson in Denver. That's what he testified to this morning. Now, if you have anything that would show any inconsistency in his testimony you can ask him a specific question, not go into the subject of the conversation.
Mr. Witt: May I try to fix the date and the times?
The Court: Yes.

By Mr. Witt:

Q. Did you talk to the FBI about that matter on one occasion or more than one occasion?
A. I can only recall one occasion in which there was a discussion.
Q. Can you fix the date of that discussion?
A. Gee, I don't know how to fix the date on that occasion because I don't know which one, which time, which meeting it was at which that particular subject was discussed.
Q. Mr. Gardner, you testified the other day that when

you got into Denver in June of '53 you went to the office; you remember that testimony?

A. Yes.

Q. And you testified you saw Clark and Sanderson there?

A. That's correct.

Q. And then you went to Travis' home?

A. That's correct.

Q. Did you leave Denver the next day after spending the night at Travis' home?

A. Yes, sir.

Q. Will you tell us whether you saw anybody connected with Mine-Mill aside from Travis the next day, the day you left Denver, before you left Denver?

A. I don't recall whether I did or not; I remember leaving from Travis' house.

Q. You left from Travis' house?

A. Yes.

Q. So you didn't go to the office first before you left Denver, is that right?

A. No, sir.

Q. Then the only time you saw Sanderson when you stopped in Denver on that occasion was when you stopped in the office on the day you arrived in Denver, is that right?

A. Yes, sir, that's right.

Q. Now, you said, if I recall, in testifying about your stopping in Denver last week, you said it was early in June of 1953?

A. Yes, sir.

Q. Can you fix the date more exactly?

A. I know it was early in June. I think I got into the [fol. 709] Couer d'Alene, to the best of my recollection roughly around the 15th of June, so it would be the difference between that time and what it would take to drive up there. I stopped in Cheyenne, and I believe in Billings—Cheyenne and Helena, and then into the Coeur d'Alene the following day.

Mr. Witt: May I have this marked for identification please?

(Defendant's Exhibit K was marked for identification.)

Mr. Witt: I want to show this to Mr. Kelley, if the Court please.

Q. Mr. Gardner, I show you Defendant's Exhibit K for identification and ask you whether you recognize that document?

A. Well, it looks like an expense voucher.

Q. Does it look like your own expense voucher for the semi-monthly period ending June 15th 1953?

A. Yes, it does.

Q. And that's your signature at the bottom of it?

A. It looks like it.

Q. Does that show the date in June '53 when you arrived in Denver and the date when you left Denver?

A. I think it does.

Q. What's the date?

A. The date is June the 11th.

Q. That's when you arrived in Denver?

A. Yes.

Q. From Fort Morgan?

A. Yes.

Q. When did you leave Denver for Cheyenne?

A. On the 12th.

Q. The next morning?

A. Yes, I think it was about noon the next day that I left.

Q. Do you remember about what time it was on June 11th that you arrived in Denver?

A. Well, it was in the morning; it was before noon, or around noon, I believe. I wouldn't be too sure of that, but it occurs to me that it was about lunch time.

Q. Do you remember where you had lunch that day, you and your family?

A. No, sir.

Q. Your wife and three children were with you?

A. Yes, sir.

Q. Three boys you had at that time?

A. Yes.

Q. And still have?

A. Yes.

Q. How old were the three boys at that time?

Mr. Vincent: If Your Honor please, we see no materiality in this.

[fol. 710] Mr. Witt: It is just preliminary. All right, I will withdraw it; it is not too important.

Q. Do you remember whether you went up to the Mine-Mill office before lunch or after luneh?

A. I don't remember; I think it was about lunch time. To the best of my recollection—I could be dead wrong on it because I can remember being up in the office—but I don't remember the time of day. The sun was shining, and that's what I know.

Q. You said the other day and just awhile ago that when you went into the office on that date, June 11th, you saw Clark and Anderson?

A. Yes.

Q. Did you see anybody else in the office?

A. Well, there were office girls there, and I believe there was somebody back in the back rooms, but I don't recall talking to anybody else.

Q. So that your present recollection is that the only people you talked to when you stopped in the office on that day were Jack Clark and Harold Sanderson, is that right?

A. Yes, to the best of my recollection. I probably talked to the telephone girl on coming in.

Q. Was Travis in the office?

A. No, sir, he was not.

Q. Do you recollect where he was?

A. Sir?

Q. You recollect where Travis was?

A. Well, they told me he was home and they sent me to his home later, and he was there when I got there.

Q. Who told you he was home?

A. Sanderson.

Q. And did Sanderson then tell you that Travis was prepared to put you and your family up that night?

A. Not to my recollection he didn't.

Q. Well, Sanderson merely sent you to Travis' home?

A. Yes.

Q. Without you knowing what you were going—

A. I know I knew what I was going there for. He told me I was going there to get a briefing on the Coeur d'Alene situation in the Coeur d'Alene.

Q. But he didn't tell you you would stay overnight?

A. No, sir.

Q. That happened after you got out to Travis'?

A. To the best of my recollection.

Q. When you testified the other day about dropping in the office, did you testify then that Sanderson told you to go to Travis' home?

A. If I was asked I did; I don't remember if I was asked.

[fol. 711] Mr. Kelley: You will find it on 972 at the top of the page, Mr. Witt.

Mr. Witt: Mr. Kelley is right, page 972.

The Court: What is the point? He wasn't asked about it, was he?

Mr. Witt: I just wanted to get the continuity. I will skip it, Your Honor; it is not too important.

Q. Did you exchange greetings with Sanderson?

A. Oh, yes.

Q. Aside from telling you to go to Sanderson's home—to Travis' home—and you would get a briefing, do you recall anything else Sanderson told you? A. Oh, I think he, very, very briefly gave me a picture of the Couer d'Alene in pretty much the same manner as Travis did, except not in the great detail that I had got it at Travis'.

Q. Now, after he gave you that brief picture of the situation of Couer d'Alene, he suggested you go out to Travis' and Travis would fill you in more on that situation, am I right?

A. Yes, that's right.

Q. Now, did you at any time since you have been furnishing information to the FBI tell the FBI about that talk you had with Sanderson in the office in Denver on June 11, 1953?

A. Well, it occurs to me that I did, although I could be wrong, but I vaguely remember some discussion relative to Sanderson, and in connection with that I believe I mentioned that talk, although I don't want to be too sure of it because I just don't remember the details.

Q. Do you remember whether the FBI asked you about that occasion?

The Court: You have been over this, Mr. Witt.

Mr. Witt: I have to connect it up; I will try to shorten it, Your Honor.

The Court: Go ahead, but I am positive that you have gone over these very same questions and answers.

Mr. Witt: It doesn't matter.

[fol. 712] The Court: Go ahead.

Q. Do you recollect whether you talked to the FBI about that conversation with Sanderson, do you recollect that whether you also talked to the FBI about your subsequent conversation with Travis the same day?

A. I don't recall it, because as I recall the discussion it had to do with Sanderson and not with Travis. Now, I might have incidentally mentioned that I seen Travis that day, but I do not recall at that time having any discussion with the FBI relative to Travis.

Q. Now, you have no recollection of when it was you might have told the FBI about this conversation with Travis?

A. No, sir, I don't.

Mr. Witt: If the Court please, based on our discussion in chambers about the procedure in connection with these statements, Your Honor, I now want to read into the record from page five, using the system of numbering we have agreed upon of the statements furnished the defense pursuant to Section 3500. Page five seems to be one page of a continuous document which begins on page three.

Mr. Kelley: Before you start reading I want to make an objection.

Mr. Witt: All right.

Mr. Kelley: Are you through?

Mr. Witt: No, I am not.

Mr. Kelley: I mean, with your preliminary—

Mr. Witt: Yes, I was about to read.

Mr. Kelley: The Government objects for the reason that first there is no inconsistencies in the material that he is offering, and it would just tend to clutter up the record.

The Court: Let me see what it is.

Mr. Kelley: I would like to show you the statement he is referring to (handing document to the Court).

[fol. 713] The Court: It goes only to his credibility and he has already testified that he had a conversation with Mr. Sanderson relative to the situation in the Idaho area, and this is not inconsistent with that statement.

Mr. Witt: No, Your Honor, may we discuss this at the bench?

The Court: All right, what is the reason?

(Discussion at the bench out of the hearing of the reporter and the jury.)

The Court: I don't see the point anyway. I haven't heard anything that would go to the weight of his testimony about the dates on this. Where is there anything that would be—

(Discussion at the bench out of the hearing of the reporter and the jury.)

The Court: Let the record show that you propose to read the matter appearing at the bottom of page five of the material furnished by the Government. That's the red mark "5" which is page four of another document. You propose to read that in the record?

Mr. Witt: That's right.

The Court: The Court has examined that and sees nothing in the statement contained in the matter you offer that is any way inconsistent with the witness' testimony or that would in any way go to the weight of the witness' testimony, and therefore the objection of the Government would be sustained.

(Discussion at the bench out of the hearing of the reporter and the jury.)

The Court: I am making my ruling on the record. That will be the way it is, because this matter will appear in the record in the form it is submitted, and I have clearly identified what you propose to read, and I have said that I thought it was not relevant or material or any proper matter to be submitted to the jury, and have ruled accordingly.

[fol. 714] By Mr. Witt:

Q. Mr. Gardner, your present marriage is your second marriage, isn't it?

Mr. Kelley: May it please the Court, that is irrelevant to the issues here.

The Court: I didn't even hear the question.

Mr. Kelley: He asked about his marriages, whether his present one was his second marriage or not.

The Court: I will sustain the objection.

Mr. Witt: I would like to make an offer of proof on this. There is materiality on that in these statements.

The Court: You can say it right now, can't you? What is the materiality?

Mr. Witt: To show that this man furnishes or gives contradictory testimony, to show that if the information which he furnished the FBI about his marriages contained on our page eight, if that's so, this man committed bigamy when he married his present wife.

Mr. Kelley: May it please the Court, I move that the statement of counsel be stricken.

The Court: I asked counsel to state his reason, and as I understand he claims there is some inconsistency in what the witness, if he answered this question, and some other matter. I don't quite understand what the problem is.

Mr. Kelley: I don't understand the problem, but his allegation, I think, should be stricken from the record.

Mr. Witt: The Court asked me. Does Your Honor want to see this first?

Mr. Kelley: This certainly doesn't prove anything.

The Court: What isn't apparent to me is whether there is anything to go into about it.

[fol. 715] Mr. Witt: That's what I have said; Mr. Kelley objects to it. According to this FBI document—

The Court: You haven't asked any question that relates to it. What was the question asked?

Mr. Witt: The question was whether this was the second marriage preliminary to putting this in evidence (indicating).

(The reporter read from his notes as follows:)

"Q. Mr. Gardner, your present marriage is your second marriage, isn't it?"

The Court: He can answer the question.

A. Yes.

By Mr. Witt:

Q. Did your first marriage terminate by divorce?

Mr. Vincent: If Your Honor please, the Government objects; it is irrelevant and immaterial.

The Court: No, let him answer the question.

A. Yes.

Q. When?

A. I think in 1946.

Q. When did you marry your present wife, your second wife?

A. In 1946.

Q. What month in '46?

A. November.

Q. What month in '46 were you divorced from your first wife?

A. March, I believe.

Mr. Witt: All right, Your Honor, I now want to read into the record two paragraphs—I am sorry, may I have those last two answers read back before I offer this?

The Court: All right.

(The reporter read from his notes the last three questions and answers.)

The Court: Now, what is inconsistent in that statement, Mr. Witt?

[fol. 716] Mr. Witt: According to this information he gave the FBI his current marriage was contracted in November, '45 and he was divorced from his wife in '46.

Mr. Kelley: The whole fallacy is that we proceed on the assumption that the report doesn't contain typographical errors or any other kind of misstatements, that this witness has not seen or approved of any of the information that is in there, and that's the thing that makes it wrong.

The Court: There may be an obvious typographical error in there which this morning you called attention to in one of these reports. I see no inconsistency except as a result of that typographical error.

Mr. Witt: There is no evidence in this record except Mr. Kelley's statement that it was a typographical error. We got this document from the Government, and we supposed the Government goes over it, and besides if we impeach the witness, if the Government has some evidence on redirect which will rehabilitate him to the effect, for example, that that's a typographical error—

The Court: I think it is getting down to the tweedly-dee and tweedly-dum stage. I noticed this morning without any hesitancy when you were reading a transcript of the Cleveland proceeding that you called attention to a typographical error, and I think the second sentence here may be read to the jury, and the jury can consider the testimony of the witness. The motion as to the first sentence will be sustained.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Witt: If the Court please, I now move for a mistrial because of what your Honor just said, the reference to a typographical error this morning from the Cleveland transcript. It was obviously a typographical error on the face of that document, your Honor, because you will recall at that point in his testimony in the Cleveland case. The witness was being interrogated about the 50's, and counsel misspoke himself in examining the witness and referred to the 40's. Here there is nothing on the face of this document of that character, and I think—

The Court: You can read the sentence.

[fol. 717] Mr. Witt: I think your Honor's comment is improper.

The Court: The jury will be the ones to judge whether it is a typographical error or not.

Mr. Witt: "Gardner married Charlotte Fischer, of Brooklyn, New York in 1936 at New York City and was divorced from her in 1946 at New York City."

The Court: I may have the thing twisted around. Let

me see that statement again. I think you can read the first sentence also. I looked at the thing.

Mr. Witt: All right, sir. Suppose I read them both.

The Court: Go ahead and read it.

Mr. Witt: Does your Honor want me to read them both?

The Court: You can read that sentence. I think that will be sufficient.

Mr. Witt: The first sentence?

The Court: Yes.

Mr. Witt: "Gardner is currently marred to Leonida Lucia Theresa (Bergamini) Gardner, whom he married in November 1945, in Minneapolis, Minnesota."

The Court: I think I did not rule on this motion for mistrial. The record can show its denial.

Q. Mr. Gardner—strike that. Did you ever live and work in New York City?

A. Yes, sir.

Q. When did you first come to New York City to work?

A. 19—about 1930, 1929 or 1930.

Q. You say about 1929 or 1930?

A. Yes, in that period. It was at the beginning of the depression.

Q. So, it could have been '31-'32?

A. No, I think it was probably 1930, may be 1929.

Q. Let me know when you are finished.

A. You can take your choice. To the best of my recollection it was 1929 or 1930.

[fol. 718] Mr. Kelley: Now, the question is a little vague to begin with. He refers to New York; there is New York State and New York City.

Q. You understood me to be referring to New York City?

A. Yes, I did, although I came to New York State prior to 1929.

Q. You understood my question. If there is any doubt, Mr. Gardner, my question was when it was that you first came to New York City.

A. It was either 1929 or 1930, and I don't remember which.

Mr. Vincent: If your Honor please, the Government fails to see the relevancy of this line of questioning.

The Court: I do not know, of course, what he is leading to.

Mr. Witt: If the Court please, I propose to read into the record in connection with this question as to when he first came to New York City from page 10 and page 13 of the statements given to the defense under Section 3500.

Mr. Kelley: May it please the Court, there is nothing here that says anything about when he went any place.

The Court: Let's see what you are talking about reading.

Mr. Kelley: It doesn't purport to give that information.

The Court: What is it you want to read?

Mr. Witt: Your Honor, this gives the residences, it says former residences on this page, and then I want to show, if the Court please—

The Court: What page?

Mr. Witt: Page 10.

The Court: What is it you want to read?

Mr. Witt: Just that line that he lived the balance of '30 to November '37, your Honor—

[fol. 719] The Court: Didn't he just testify to 1929?

Mr. Witt: I have an inconsistency on another page here, page 13. I want to offer them both together, so the material from these statements will all be in the record. It has a sentence in that paragraph which says he had come from Chicago, Illinois, to New York City in 1935 to seek employment.

The Court: I don't think there is any inconsistency unless you call attention to the matter. You have pointed out here this which is the second item on page 10 and the last line of the first paragraph of page 13. The objection will be sustained.

Mr. Witt: Not the last line of the first paragraph.

The Court: The last line in the first paragraph on page 13 I said.

Mr. Witt: All right, sir.

Q. Now, Mr. Gardner, will you tell us what your first job was in New York City?

Mr. Kelley: The Government objects to that as being irrelevant, no material value in this case.

The Court: You can answer if you can recall.

A. The first job that I can recall getting was with the Department of Hospitals as a general roustabout or laborer. I was assigned, I believe the first place I was assigned was Morrisania Hospital.

Q. When did you begin working there, Mr. Gardner?

A. I don't recall. It was probably shortly after I got to New York. It has been a long time ago.

Q. About when was that?

A. I suppose 1930.

Q. Until when did you work there?

A. I imagine until about 1934.

Q. Then your best recollection is that you had a job for about four years?

A. Three or four years. That is pretty hard to remember.

Q. Do you remember being asked how long you worked on that job when you testified before Senator Watkins in Cleveland in 1952?

[fol. 720] The Court: He need not answer that question. If you think it is inconsistent, you can read the question and answer, and the jury will draw their own conclusion and not tax his recollection here twice as to what he testified to and what the fact is, both.

Mr. Witt: All right, sir.

Q. On page 70 of the hearings before Senator Watkins at the bottom of the page Mr. Arens asked the following question and Mr. Gardner gave the following answer: "Mr. Arens: Give us, if you please, a brief resume of your employment activities. Mr. Gardner: Well, in my youth I worked on farms and in canneries. It has been a long time ago, and I can't remember in detail. Mr. Arens: Of course, we would not expect you to." At the top of page 71 appears Mr. Gardner's answer: "I worked for the City of New York for approximately seven years."

The Court: Where is there anything inconsistent with what he testified to?

Mr. Witt: He said he worked for the City of New York at the hospital.

The Court: You stated the difference. He might have been working for the Police Force.

Mr. Witt: I am coming to that.

The Court: Go to it first.

Mr. Witt: But he never said on other occasions that he worked for the Police Force.

The Court: He said he worked for this hospital three or four years.

Mr. Witt: I will ask him.

Q. Mr. Gardner, did you work for the Police Department in New York City?

The Court: The Court used that simply as a matter of illustration.

[fol. 721] Q. Mr. Gardner, aside from the job at the hospital did you have any other job with the City of New York?

A. Not that I recall.

Q. Did you—strike that.

Mr. Witt: Now, in connection with the same answer, if the Court please, I now propose to read from page eight of the statements furnished to the defense under Section 3500. I will point this out to Mr. Kelley at the bottom of the page, just one line. I will wait to see if Mr. Kelley has an objection.

Mr. Kelley: Yes, I have an objection. First, the Government objects for the reason that this is not anything that the, it is not a statement within 3500. The witness has had no opportunity to examine or adopt it, and secondly, it is not inconsistent with his testimony on cross examination. It is irrelevant to the issues in this case. It is a side issue.

The Court: Let me see it.

Mr. Witt: Referring to that line about his employment with the hospital.

The Court: I think the objection will be overruled, and he can read it.

Mr. Witt: This is under the general heading on that page "Employment History", and after listing one other employment this is what I want to read into the record. "February, '30-June, '36," that is under the heading "Dates", then under the heading "Employer" is the "Morrisania Hospital", and under the heading "Location", "Bronx, New York," and under the heading of "Position" —"Attendant".

Q. What was your job after the job at the hospital?

Mr. Kelley: May it please the Court, it seems to me this is not the proper way to test a man's credibility. We object to it as irrelevant.

The Court: The only possible purpose would be to some contradictions or some inconsistency in the defendant's testimony that would reflect upon his credibility. It has no relevancy to the transaction here. Technically, probably [fol. 722] the matter in some degree is at variance, and, of course, the jury are the judges as to whether the variance is branded something inconsistent or something of that nature. I will sustain the objection to this question unless it is made more specific. I mean just taking a person down the line about where he worked or where he was on such and such a date you can ask him specifically fixing some time so that the witness will have something to go by as to when you are talking about.

Mr. Witt: I am sorry, your Honor, that destroys the purpose of this attempt to impeach his credibility. I fixed the time, and I don't think it could be more specific in terms of a normal witness. I asked him what his job was after his job at the hospital to which he testified. On the witness stand here he said that job lasted until 1934, I think he said 1933. So, he knows the time I am asking about.

The Court: I think I will let him answer if he recalls.

A. The best I could recall, that is a long time ago, and it is very difficult to give a real accurate answer, to the best of my recollection I went to work for the United States, that is, the United Electrical Radio, and Machine Workers in the summer of 1936. Now, prior to that I had been employed for a period of time with the Department of Hospitals and then a union that was connected with the employees in the Department of Hospitals, and just for my own benefit and to make this answer clear I remember that the Communist Party directed us to form a union in the hospital field in which I was working in 1933. Now, as I recall it, I continued my employment with the hospitals for a period of time after that, and then for a brief period of time I worked as a full-time officer of the union in that field and then went to work

for the United Electrical, Radio, and Machine Workers of America which I think was about 1936 that I went there. Now, I could be a year off one way or the other. That is the best of my recollection of it, the events leading up to my employment in that very early period.

Q. Are you finished?

A. Yes, sir.

Mr. Witt: I move that that part of the witness's answer about the Communist Party directing his employment be stricken from the record.

[fol. 723] The Court: The motion will be denied, and the answer will stand.

Q. Now, Mr. Gardner, didn't you give testimony about your work during that period with this union you just referred to when you testified the week before last in Cleveland?

Mr. Kelley: If the Court please, that is irrelevant.

The Court: I will sustain the objection. If you wish to ask specific questions, you may.

Mr. Witt: All right, sir.

Q. First, what was the name of that union referred to connected with the Hospitals?

A. The Building Service Employees International Union and, as I recall it, that was Local 171 that I was connected with.

Q. You said you had that job for a previous period. Can you fix that period now before I go to the—

A. We formed the union in 1933 and—

Q. Mr. Gardner, just tell me when you worked for the BSEIU as an organizer.

A. I worked for them from the time it was formed, but I also worked at the hospital too. During that period—

Q. Give me the dates.

A. I tried to. From 1933 to 1936 is the best of my recollection. Now, again, to complete that answer, a lot of that time was spent at the hospital, but I was still an employee of the local union.

Q. All right, now, Mr. Gardner, I will ask you whether you don't recall the following answers you gave to the

following questions when you testified in Cleveland recently on January 14. I am referring, Mr. Kelley, to pages 686 and 688, at 686, this is on direct examination:

"Q. Now, will you tell us beginning with the first one which trade union organizations you were associated with?

"A. Well, the first one I was associated with was the Building Service Employees International Union, New York City.

"Q. All right.

"A. In the early '30's."

Page 688:

"Q. And how long did your connection with the Building Service Employees International Union last at that time?

"A. Probably about a year and a half, as best I can recall."

[fol. 724] Mr. Kelley: May it please the Court, I move that that be stricken. It has no probative value here; it is consistent with what he said and what he is doing is cross examining him at this time upon answers he gets on cross examination with material that he gave at another time. He is not cross examining him as to his testimony on direct; it is improper cross examination.

The Court: I don't observe the inconsistency.

Mr. Witt: Your Honor, I am going to give him now all the statements—

The Court: You were just going over the same thing with no inconsistency in the statements at all.

Mr. Witt: Will Your Honor bear with me a minute on this and I will give him other material and then ask him whether he didn't give other answers?

The Court: No, the jury will disregard this part of it, at least as far as we have gone, because there is no inconsistency apparently on the face of it.

By Mr. Witt:

Q. All right, Mr. Gardner, page 71, I will ask you whether you recall being asked the following questions and giving the following answers when you appeared before Senator Watkins in Cleveland in 1952, after talking about your work in the hospital.

"Mr. Aarons: All right, sir, go ahead, if you please.

"Mr. Gardner: And I worked for the American Federation of Labor.

"Mr. Aarons: In what capacity?

"Mr. Gardner: As an organizer.

"Mr. Aarons: At about what period?"

The Court: What does that have to do with this?

Mr. Witt: The next answer when he gives the dates: [fol. 725] that's the same job he is talking about.

The Court: What is the connection between that answer and his testimony here in this court?

Mr. Witt: That's the same job I have just been asking him about, and he is giving the dates in the next answer.

The Court: I don't know that it is—

Mr. Witt: I will ask him; if there is any question I will stop now.

Q. Mr. Gardner, when you said you worked for the American Federation of Labor when you were before Senator Watkins, were you referring to this job you had with the BSEIU?

A. Yes, sir, I was, but there is also one important thing about that. I was under Communist Party instructions not to cooperate with the Senate Internal Security Committee, and I certainly did everything possible to avoid giving any accurate information, in line with the Communist Party's position at that time, and as far as I know up to the time I expelled from the party.

Mr. Witt: If the Court please, I move that everything the witness just said after he answered my question that has reference to the AF of L was the same as his reference here to the BSEIU, I move that all of that be stricken from the record.

The Court: The remainder of the answer will be stricken. That will develop when you ask him the question, I assume.

Mr. Witt: I don't think that is correct, Your Honor.

The Court: If there is any.

Mr. Witt: He may want to go into that on redirect. I also ask that the jury be instructed to disregard everything the witness said after he answered my question.

The Court: I have already said it will be stricken, and

th jury will disregard the answer except for the fact that this union was connected with the AF of L.

[fol. 726] Mr. Witt: No, sir, I asked him whether when he—I withdraw that.

By Mr. Witt:

Q. Now, continuing: "Mr. Aarons: In what capacity?

"Mr. Gardner: As an organizer.

"Mr. Aarons: At about what period of time?

"Mr. Gardner: As near as I can recall that was probably 1935 to 1937."

Mr. Gardner, do you recall giving the FBI information about your job with the Building Service Employees International Union?

A. I don't recall specifically.

Mr. Witt: If the Court please, I propose to read one line from the statements furnished to the defense pursuant to Section 3500 on page 8, which is the line after the one I have already read about his job in a hospital in the Bronx.

Mr. Kelley: The Government has the same objection as stated.

The Court: All right, the objection will be overruled.

Mr. Witt: This is page 8, as I said, under the same heading, "Employment History," under the column, "Dates, June '36-1937," under "Employer, AF of L," under the heading, "Vocation, New York City," under heading, "Position, Organizer."

Q. I will ask the witness now that he has heard that whether he remembers telling the FBI about that?

A. No, and I am sure I am not responsible for any statements that they might have thought they heard or dates that they thought they heard in telephone conversations, or otherwise.

Q. At any time that you have given information to the FBI have you been under orders from the Communist Party to mislead the FBI?

A. (No response.)

Q. Will you answer that question?

A. I don't understand your question. I think it was—

[fol. 727] Mr. Kelley: I think it is immaterial and irrelevant.

The Court: The witness says he doesn't understand the question.

Mr. Witt: All right, I will withdraw it.

Q. Now, did you already say—I think you did—that your next employment after your job with the BSEIU was with UE?

A. Yes, sir.

Q. And you said that was in '36 or the summer of '36?

A. I think roughly around the middle of '36 I first went to work for what was then District 12.

Mr. Witt: Now, in connection with that answer, Your Honor, I have indicated to Mr. Kelley that I propose to read into the record from page 8 of the statements furnished the defense pursuant to Section 3500 the reference to that matter which appears at the very bottom as the last item on that page.

Mr. Kelley: We have the same objection to that that we have to all this line of testimony.

The Court: I will overrule the objection.

Mr. Witt: This is under the same heading on that page, "Employment History," in the column entitled "dates, 1937 until about November, '37." Under the column entitled, "Employer, United Electrical Radio & Machine Workers of America, CIO." Under heading, "Vocation," in that column, "New York City." Under the heading of "Position" in the last column, "Organizer."

Q. Do you remember testifying on the stand here last Thursday on direct examination that you were an International Representative of the UER & MW from 1936 to 1950?

A. Yes, sir, and that might be inconsistent only in the sense that for a period of a few months I worked for District 12 as a district organizer and then went on the international staff of the Union, and I believe in 1937—it could have been late in 1936—and continued in there until 1950.

Q. Do you remember testifying about your work with the UE when you appeared before Senator Watkins?

A. I don't remember anything specific.

The Court: You can ask him if he answers that question—

[fol. 728] Q. Did you give the following testimony when you appeared before Senator Watkins in Cleveland, April, 1952, page 71: "I worked for the United Electrical Workers from 1937 to, I believe, 1949"?

The Court: Where is the inconsistency?

Mr. Witt: Your Honor, he said last week on the witness stand here he worked for them until 1950, and he said on the witness stand here last week that he began working for the UE in 1936, and he told Senator Watkins in 1937—I have already read into the record what he told the FBI, or at least what the FBI document shows that he worked from '37 to late '49, and he testified under my cross examination this afternoon that he began working for them in the summer of '36 or in the middle of '36.

The Witness: I am here attempting to give accurate information. On some of those it was a guess that was all that was needed, and if I guessed wrong by a few months, I think that's not too bad.

Mr. Witt: I am sorry, Your Honor, just a moment; I apparently have the wrong reference.

Q. Mr. Gardner, page 71, Senator Watkins, continuing with your answers to Mr. Aaron in Cleveland before Senator Watkins in 1952 about your employment, I will read the rest of that answer, part of which I read a little while ago, page 71:

"Mr. Gardner: I worked for the United Electrical Workers from 1937 to, I believe, 1949. I am not too sure there. I think it was 1949. I worked for the Ward Products as a factory worker from 1950 to sometime in 1951 when I worked for the Mine-Mill & Smelter Workers."

Was that answer you gave in response to Mr. Aaron's question a correct answer?

Mr. Kelley: May it please the Court, I think the proper question is whether or not that is the answer he gave at that time.

The Court: That's right.

[fol. 729] Q. Is that the answer you gave at that time?

A. To Senator Watkins?

Q. Yes.

A. I believe that it could have been; I don't remember what I said there. I don't even remember the specific questions, but if it is in the book it probably is so.

Q. Now, did you at any time when you appeared before Senator Watkins on that occasion give testimony that you worked for the Union Carbide Company between the time you worked for the UE and the Ward Products Company?

The Court: I will sustain the objection.

Mr. Kelley: The Government does object to it, Your Honor.

The Court: I will sustain the Government's objection.

Mr. Witt: All right, then, if the Court please—

The Court: There has to be something before you use any contradictory material to contradict, so there has to be some foundation laid before you can use any material that you think has a tendency to contradict the witness. What is it now we are talking about?

Mr. Witt: I now propose to show from a statement furnished—

Mr. Kelley: You haven't asked him about whether he has ever made the statement or not.

Mr. Witt: The statement of the FBI?

Mr. Kelley: If he made it to Senator Watkins' committee.

The Court: Did he say anything inconsistent with it?

Q. Did you ever tell the FBI about some other job that you had between the time that you left the UE and the job you had with Ward Products?

A. If they asked me I told them; if they didn't ask me I probably didn't tell them.

Q. Do you recall whether they asked you?

A. I don't recall.

Mr. Witt: If the Court please, I propose—

[fol. 730] The Court: No, call his attention to what you claim he said; you can ask him. You needn't show it to him; ask him if he said such and such.

Q. All right; when you furnished information to the FBI in Butte did you tell the FBI that from late '49 until September, 1950 you worked as an official of Union Carbide Chemical Company in Ashtabula, Ohio?

A. Oh, no, I very definitely did not. If that is there that's what they might have thought was said, but I definitely did not make any such testimony anywhere that I was an official of the Union Carbide & Chemical. I was employed by the Union Carbide for about fifteen minutes one morning, maybe a little longer.

Q. When was that?

A. Oh, that was at the same time I went to work at Ward Products. It might have been during a brief lay-off at Ward Products, or it might have been the day before I went to work at Ward Products, but I definitely was never an official of the company.

Q. And you definitely—

A. And my work there was so brief that you would certainly have to call it to my mind to make me remember it.

Q. But, you said if I followed you a minute ago that you worked there for only fifteen minutes?

A. Well, I don't know how long it was; I was down in the furnace room a short time; actually I don't remember. I don't think it was very long.

Q. When you say "not very long" you mean—

A. It could have been a day or two.

Q. But no more than a week?

A. No.

Q. So that—

A. I doubt seriously if it was a week, just a flash back of memory, I can't remember working there a week.

Q. Just so you will complete your answer and search your recollection, do you recollect whether you worked there for a period closer to fifteen minutes or closer to a full week?

A. No, it was probably a day or two.

Q. Then this statement in this FBI document, aside from the word "official" as far as the dates are concerned when it states that you worked for Union Carbide from late '49 to September, 1950 does not reflect the actual facts as you recall them?

A. Oh, no, very definitely not. They are all mixed up on that one, if that's what it says. I have never seen it so I don't know what it says.

Q. You never saw that?

A. No, sir.

Q. Didn't the Government show you that statement in the [fol. 731] FBI report before you took the witness stand last week?

A. The only thing the Government has shown me before I took the witness stand was a bunch of documents that you got from Cleveland; I didn't have a chance to finish those even.

Q. Did you leave that short job with Union Carbide or were you discharged?

A. No, sir, I—

Mr. Kelley: The Government objects to that; it is improper cross examination.

The Court: I will sustain the objection.

Mr. Kelley: It makes no difference.

Mr. Witt: If Your Honor pleases, I am going to a different subject aside from his employment now. I wonder whether you would consider a recess now?

After Recess

FRED GARDNER, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (continued):

Q. Mr. Gardner, I think you have already testified that you told the FBI about your conversation with Sanderson here in Denver in June of '53. When you talked to the FBI on that occasion did you tell the FBI what the purpose was of your stopover here in Denver?

Mr. Kelley: May it please the Court, this matter has been gone into, and I think it is improper practice to skip around from one subject to another and then come back.

The Court: I do not know about the practice, but I am reasonably sure that the thing has been gone into twice.

Mr. Witt: This is the only question that I want to ask before I conclude this with an offer in evidence.

The Court: He may answer this question. My recollection is not sure enough to say that this precise question was answered, but the subject matter was gone into.

[fol. 732] Mr. Witt: The subject was gone into.

A. I don't know. That I don't know. That is a little detail that is hard for me to remember. If they asked me, I am sure I told them the truth. But if they didn't ask me, it probably isn't there.

Q. I didn't ask you about that. I simply asked you whether you told them about your talk with Sanderson here in Denver in 1953, whether you told them what the purpose of your stopover was.

A. I don't know. I don't recall.

Mr. Witt: In view of that, if the Court please, I now propose to read the first sentence of that paragraph on our page 5, and I show it to the Court.

Mr. Kelley: The Government objects to it for the reason there is no inconsistency and for the other reasons we have stated such as the thing has never been presented to the witness for his adoption.

The Court: That part doesn't interest me so much, but I don't see the inconsistency at all.

Mr. Witt: Just in this sense he just answered my question, that is why I asked you for the foundation of this.

The Court: He said he didn't recall.

Mr. Witt: He says in that first sentence what he stopped in Denver for, to confer—I don't want to say it in front of the jury—to confer with so and so and so and so. That is the point.

The Court: But he said he doesn't recall whether he did or not. I think I will sustain the objection.

Mr. Witt: All right, your Honor. I just want to ask him one question before I come to my offer along the same lines about the episode involving the trip from Buffalo to Canada.

Q. Mr. Gardner, do you recall whether you ever told the FBI about that trip you made with Travis and Clark to Canada and your return with Travis to Buffalo in 195;? (sic)

A. I don't recall offhand of telling him about it. I don't [fol. 733] recall them asking me. If they did, I told them.

Mr. Witt: If the Court please, in connection with both these excerpts, both the incidents about which the witness testified on direct examination, the incident in 1951 involving the trip from Buffalo to Canada and back, and the incident in June, 1953, we now propose a stipulation to the Government that nowheres in the statements furnished to the defense pursuant to Section 3500 is there anything about either of those episodes.

Mr. Kelley: I do not understand the stipulation.

The Court: I think the witness has testified to that effect, hasn't he?

Mr. Kelley: Well, he has testified that he—

Mr. Witt: He doesn't remember.

Mr. Kelley: He gave them whatever information—

The Court: He said he didn't recall that he mentioned it at all.

Mr. Witt: Either incident.

The Court: He testified this morning about it, and just now he said he didn't recall whether he gave them any information about it in effect as I understand his testimony.

Mr. Witt: And that is the exact purpose of the stipulation. Since the witness has now testified he doesn't recall whether he told the FBI about either of those episodes, we are offering this stipulation to clear the decks on that to the effect that the statements furnished to the defense under Section 3500 show that he did not at any time tell the FBI about either episode.

Mr. Kelley: Well, I would not stipulate to that, because this report, which is page 5 of the Gardner material, refers to him having talked to Mr. Travis. I would be willing to stipulate that all of this be offered in evidence and let the jury decide whether or not it is consistent with his testimony.

[fol. 734] Mr. Witt: Mr. Kelley is wrong in reference to page 5, and it is very important that we get straight on that, if the Court please, so the jury won't be confused. This first sentence on our page 5 does not say that he did talk with Travis.

The Court: What is there for the Court to rule on? You have asked the Government for a stipulation, and they have said they don't want to stipulate.

OFFER IN EVIDENCE

Mr. Witt: Nothing. In view of that, in view of Mr. Kelley's statement that he has no objection that this entire batch of statements furnished to the defense under Section 3500 be offered in evidence we now accept that, and we offer all the statements furnished the defense under Section 3500 in evidence consisting of 16 pages.

Mr. Kelley: The Government has no objection to stipulating to it. We see no particular relevance to it, but we don't object to it.

The Court: Under the stipulation you had better have the whole statement now identified with an exhibit number.

Mr. Witness: (sic) This is not in our stipulation. It is now offered in evidence.

The Court: Mark it with an exhibit number, and it will be received in evidence.

(Document marked Defendant's Exhibit L for identification received in evidence.)

Mr. Witt: May we withdraw it for the time being and talk about furnishing copies?

Mr. Kelley: We furnished that to you and one is enough. You can offer that in evidence.

The Court: You can use it; it is in evidence. It is to remain as an exhibit now. You can use it in your examination just like you could use any exhibit.

Mr. Kelley: I think we should also make it clear that Exhibits I and J are a part of this same exhibit for the record.

[fol. 735] The Court: I think that would appear from his examination.

Mr. Witt: I think the record is self-explanatory on that if the Court please.

Q. Mr. Gardner, when was it that your employment with Mine-Mill terminated?

A. It was to the best of my recollection about July, 1955,

Q. Was it terminated by your discharge?

A. Yes, sir.

Q. After your employment with Mine-Mill was terminated what was your next job?

Mr. Vincent: If your Honor please, the Government objects to that. That goes after the year 1955.

The Court: Well, I don't know the purpose, but I think he can answer the question.

A. I worked in the open pit in Butte on a power shovel.

Q. For what company was that?

A. For the F and S Contracting Company.

Q. How long were you on that job?

A. Well, until the ore froze up, so, it was sometime in the late fall I would suppose. The ore froze in the cars, and we were laid off because they could not handle the ore at the time at the smelter.

Q. When did you start on that job?

A. I believe it was August although here again I could be a few weeks one way or the other.

Q. What was your next job?

A. Well, I spent the Christmas Holidays working in the department store as a saleman just for the Christmas Holidays.

Q. Then what was your next job?

A. I went to work as a Consultant and Conciliator for the International Hod Carriers, Building and Common Laborers Union of America.

Q. When was that?

A. That was I think the first day of January, 1956. I had finished working in the store for the Christmas Holidays, and it followed that so I might conceivably have gotten a couple of days' pay in December, but I think it was probably from the first of January.

Q. When was it that you first began discussing with the Hod Carriers a possible job with them?

Mr. Kelley: That is wholly immaterial to any issue in this case.

[fol. 736] The Court: Sustained.

Mr. Witt: Might I be heard on this, your Honor, and this is preliminary, because I intend to try to show that

the Hod Carriers and the Mine-Mill were rivals in 1955, at the time this man's employment in Mine-Mill terminated and that they continued to be rivals to date?

The Court: What would be the relevancy of that?

Mr. Witt: The same in the case of the witness Eckert to show this man's interest in this proceeding and the outcome of it and to try to show that because of his employment with a union which is a rival to Mine-Mill his interest would be in hurting or damaging Mine-Mill and any person connected with Mine-Mill.

Mr. Kelley: On the face of it it is ridiculous. This man was fired from Mine-Mill in the summer of '55, and he didn't go to work with this union for six months.

Mr. Witt: The fact the man was fired just emphasizes the point, his hostility to Mine-Mill would be—

The Court: You have shown he was discharged.

Mr. Witt: But my effort is to show his work for a rival union which down to recent days—

The Court: Ask him the question about whether it was a rival union and what you want to, not the preliminary question. I will sustain the objection to that.

Q. In 1955 at or about the time you were fired by Mine-Mill were the Hod Carriers and Laborers Union a rival to Mine-Mill in the non-ferrous metals industry?

A. No.

Q. At any time since you began to work for the Hod Carriers in January, 1956, have the Hod Carriers and Laborers been a rival or opposed to Mine-Mill?

A. There has been some negotiations or discussions on the possibility of merger but they have never been rivals.

Q. Now, aside, when you say discussions you mean between the Hod Carriers and Mine-Mill?

A. Yes, that was for top level discussions for the purposes of effecting an affiliation through negotiation, but they [fol. 737] were never rivals, and they are not now today.

Q. Wasn't that because, didn't those discussions take place because the Hod Carriers and Laborers have been doing—

The Court: You need not go into it further. You said you could show they were rivals and thereby show some

interest on behalf of the witness, and the answer is they are not rivals. So, let's go to something else.

Mr. Witt: I want to impeach him with very specific references I have here about that.

The Court: I think you have proceeded on that far enough.

Mr. Witt: Then on this I am anxious to make an offer of proof as I did in the case of the witness Eckert. May I make my offer of proof?

The Court: Well, you can make an offer of proof, not here before the jury, if you have any proof to offer.

Mr. Witt: Well, I think I do, your Honor; otherwise, I would not be making it, and I do not think your Honor should comment on it until I make it.

The Court: I tell you you can make it, and I will comment on it when I make it, and I simply say it should be done on it when I (sic) make it, and I simply say it should be done out of the presence of the jury.

Q. Mr. Gardner, before you took your job with the laborers did you advise any FBI agent that you intended to take a job with the Hod Carriers and Laborers?

Mr. Kelley: May it please the Court, that is wholly immaterial.

The Court: I will sustain the objection.

Q. At the time you took your job with the Hod Carriers and Laborers, Mr. Gardner, did you advise them, any official of the Hod Carriers and Laborers with whom you discussed the job that you had been giving information to the FBI about Travis or about Mine-Mill?

[fol. 738] Mr. Kelley: Objected to as wholly irrelevant.

The Court: I will sustain the objection.

Mr. Witt: I will make this as part of my offer of proof, if the Court please.

Q. Just one question without transgressing on your Honor's ruling before I leave it that your Honor may think proper in connection with the Hod Carriers, Mr. Gardner, are you aware of the fact that at the convention of the Metal Trades Department of the AFL-CIO, the

last convention in December, 1957, that a resolution was passed to the effect that Mine-Mill should get a charter from the AFL-CIO and the Hod Carriers and Laborers in the discussion opposed that resolution?

Mr. Kelley: May it please the Court, that is wholly immaterial.

The Court: I will sustain the objection.

Mr. Witt: All right, I will make that part of my proof.

Q. Mr. Gardner, I think you have testified here that you were expelled by the Communist Party.

A. Yes.

Q. Will you tell us about when that was to the best of your recollection?

A. I was notified that I was expelled, notified by a rank and file member that I was expelled.

Q. When was that?

A. Roughly it occurred to me as about March or April.

Q. Was that rank and file member you have reference to named Arthur Morelas?

A. Yes.

Mr. Witt: In view of that at this point I propose to read page 2 of Defendant's Exhibit L in evidence.

The Court: Well, the exhibit is in evidence as I understand now.

Mr. Witt: I want to read it to the witness and ask him whether he gave this information to the FBI.

The Court: It is already in.

[fol. 739] Mr. Witt: I will withdraw it.

The Court: I am right, am I not?

Mr. Kelley: Yes, the whole document is in evidence.

Mr. Witt: Yes, it is in evidence.

Q. Do you recall telling the FBI that was Arthur Morelas who told you that you had been expelled?

A. It occurs to me that that is correct. I could be wrong, because there was already lots of rumors around that I had been expelled.

Q. But it was Arthur Morelas that told you?

A. As I recall it, it was Arthur Morelas.

Q. At the time you were a member of the Communist

Party in Butte, Montana, did you know that Arthur Morelas was then a paid informer for the FBI?

Mr. Kelley: May it please the Court, that is wholly irrelevant to the issues here.

The Court: I don't see the pertinence.

Mr. Witt: Let me ask another question, and I would like to be heard on that perhaps in Chambers.

The Court: You may proceed.

Q. At any time since Arthur Morelas told you you were expelled from the Communist Party have you been informed by the FBI that at the time you were in the Communist Party with Arthur Morelas that Arthur Morelas was a paid informer for the FBI?

Mr. Kelley: I object to that as incompetent and immaterial.

The Court: I sustain the objection.

Q. Did you at any time receive written notification from the Communist Party that you had been expelled?

A. No.

[fol. 740] Mr. Witt: If Your Honor will give me a minute or two I think I can complete my cross examination in a few minutes.

Q. Mr. Garner, (sic) you testified earlier this afternoon that it was after you testified in the Cleveland case, I think this was your testimony, were you asked to testify in this trial against Travis, is that right?

A. Yes, sir.

Q. Was that on the long distance telephone?

A. No, sir.

Q. Were you asked in Cleveland?

Mr. Kelley: May it please the Court, that is irrelevant to any issue in this case.

The Court: I don't see the point; he has testified to the fact. What difference does it make whether he was asked by telephone or in person or by letter or what?

Mr. Witt: This is preliminary again in connection with the witness' testimony that he never remembers talking to the FBI about Travis, so that I want to show on this

occasion when he was asked, if not before, he was asked about Travis; that's all.

The Court: You have asked him that and he has answered that two or three times, if my memory is right.

Q. Then let me try it this way: Before you were asked to testify in this trial against Travis were you asked whether there was testimony you could give about Travis?

A. No, sir, they asked me to stop in Cleveland on my way—stop in Denver on my way to Anchorage and they would talk to me here, and discover whether there was any contribution I had to make to this particular hearing.

Q. And you stopped here on your way to Anchorage, is that right?

A. Yes, sir, I did.

Q. And was that the first occasion when you stopped here and you were talked to about Travis, was that the first occasion at any time since you first began to furnish information to the FBI, that you gave information to the Department of Justice about Travis?

Mr. Kelley: May it please the Court, I think this has been asked and answered several times.

[fol. 741] Mr. Witt: I don't think so.

The Court: I think it has been answered several times. I will sustain the objection o that basis.

Mr. Deikman: Was the answer "yes"? Could the Court inform us on that?

The Court: What?

Mr. Deikman: Was the answer to that "yes"? He has never talked to the FBI about Travis?

The Court: I think if you refer to the Court's notes that his memory on the testimony is not infallible. We will look at the record, and I think, as I say, my best recollection is that he has answered the question before, and if I am wrong—

Mr. Deikman: Just to clarify it for me personally, Your Honor, I would like to know what his answer is, yes or no.

The Court: I say, we will look at the record. That's the way to find out, and that's the way to find out if the question has been answered. If the Court is wrong, why,

of course, there may be a basis for letting him answer again. I think it has been testified to.

By Mr. Witt:

Q. Now, you said, Mr. Gardner, that you were told to stop in Denver or they told you to stop in Denver. Who told you to stop in Denver?

A. A Department of Justice attorney, or at least he said he was a Department of Justice attorney.

Q. In Cleveland?

A. No, sir.

Q. In Denver?

A. No, sir.

Q. Where?

A. Washington, D. C.

Q. Did he call you?

A. No, sir.

Mr. Vincent: If Your Honor please, I think this is objectionable.

The Court: I will sustain the objection. If you can show me any relevancy about who asked him to come or not—

[fol. 742] Mr. Witt: This is preliminary to interrogating this man about whether he ever told anybody connected with this prosecution whether it is an FBI agent or anybody else representing this prosecution about Travis before he took the witness stand.

The Court: My point is I think he has answered the question two or three times, and I sustained an objection to that question a few moments ago, and I said if the Court's memory was wrong we would look at the record and determine whether you should ask the question, but this is, you say, preliminary to the same question, so the objection will be sustained.

Mr. Witt: Well now, just so we can finish with this, Your Honor, and not take any more of your time and the time of the jury on it, because I am also as vague as Mr. Deikman seems to be, is Your Honor's recollection that this man has said that he hasn't or that he doesn't remember?

The Court: I say, we will refer to the record. The Court is not going to rely on his memory. My impression is that he has answered the question. I don't say that as a fact; I say we will refer to the record and see if he answered the question that I sustained the objection to a moment ago; and if he has I sustain it on the basis that he has already answered the question. If he hasn't, that's something else.

Mr. Witt: I misunderstood. You mean we will do that later in chambers?

The Court: We will do it anytime. We can let the reporters look it up. We can wait until we are in chambers, I expect.

Mr. Witt: Why don't we hold that in chambers?

The Court: Go ahead with your cross examination.

Mr. Witt: All right; I will complete it.

By Mr. Witt:

Q. Mr. Gardner, you have received the per diem and the witness fee, have you, for testifying in Cleveland?

A. Well, no, sir; whatever there is is sent to my home in Anchorage.

[fol. 743] Q. Well, when you appeared before the grand jury in Denver did you receive a per diem and witness fee?

A. Yes, sir.

Q. Did you receive an expert witness fee?

A. No, sir.

Q. When you testified before the grand jury in Cleveland did you receive the per diem and the witness fee?

A. Yes, sir.

Q. Did you receive the expert witness fee?

A. No, sir.

Q. I will ask you the same questions about your testimony in New York before a grand jury. Did you receive a per diem and a witness fee?

A. No, sir—oh, yes, I received a per diem and witness fee.

Q. But, you didn't receive the expert witness fee?

A. No, sir, I did not.

Q. Is that right?

A. Yes, sir, that's correct.

Q. Now, at any time since you have begun to furnish information to the FBI have you received any payments from the FBI in connection with your furnishing information?

A. Yes, sir, I received $10.

Q. I haven't asked you that yet, Mr. Gardner.

A. Oh, I see.

Q. Can you tell us or approximate how much you have received altogether?

A. Well, from the FBI?

Q. Yes.

A. I have received to the best of my recollection $10.

Q. When was that?

A. Well, I think it was in July or August of 1956. They paid my babysitter for me.

Q. Is that the time you were spending time talking to them?

A. Yes, sir.

Q. You needed a babysitter, do I take it, because you were at the FBI office?

A. Yes, sir.

Q. And your wife was away from home?

A. Yes, sir.

Mr. Witt: Would Your Honor just give me half a moment? The question I had a minute ago has now slipped my mind. Just one matter I want to check in my notes, Your Honor. I think it will take me a half a minute.

Q. Mr. Gardner, did you come to Denver in February, 1955 to attend an executive board meeting of Mine-Mill?

A. Yes, I believe I did; I am not sure of the time.

Q. That was the last board meeting you attended before you were fired by Mine-Mill, wasn't it?

A. Yes, sir.

Q. Did you travel to Denver with Executive Board Mem-
[fol. 744] ber Salvas and another staff member?

Mr. Kelley: May it please the Court, we object to any further pursuit of this line of questioning. It covers a

period outside the period covered in his direct examination and it is irrelevant to the issues.

The Court: Of course, I don't know the purport of it or the objective.

Mr. Witt: This should be outside the presence of the jury, I think. May I approach the bench? It will take a moment. I can hold this together with our other matters; this is towards the end, and discuss it in chambers, whichever way Your Honor prefers.

The Court: That may be the shortest way to do it, take it up in chambers.

Q. All right; now, Mr. Gardner, earlier today when I was examining you and asking you about your vouchers, you said something about expenses you had in connection with your Communist Party activities that appeared—

A. I didn't say I had them, but I said that they at times had advised me that that could be done.

Q. Well, to clarify that, did you ever do it on any of your vouchers?

A. No, sir, not that I recall, I never did.

Mr. Witt: All right, that completes our cross examination. We will pass our witness subject to these problems we have in chambers and our offers to prove.

Mr. Kelley: May it please the Court, I think in order that we might have a chance to finish up this witness before the end of the day, if there is any possibility that we could resolve these offers and these other questions and let him finish his testimony before the jury is excused.

The Court: I think we will try this: we will try and see if we can do it in fifteen minutes. I don't know what the chances would be, and that would give time, if there is any more to be done in here with the witness, to call him back; so we will have a fifteen minute recess, but if it appears that we can't complete the matter within fifteen [fol. 745] minutes, why, I will advise the bailiff and the jury can be discharged until tomorrow or they can be returned to the court and we will decide that then, but we will try to get this thing settled by 4:00 o'clock so there can be a fifteen minute recess.

(Recess taken.)

In Chambers

Colloquy Between Court and Counsel

The Court: Mr. Kelley, you objected to a question that Mr. Witt asked on the basis that it had been answered, and I sustained the objection. It was my impression that the witness had answered the question. Now, do you know if that is to be found in the record?

Mr. Kelley: Well, no, I wouldn't, Your Honor. I would think that would have been covered in today's testimony, because he has just been on cross and I don't believe we have any of the transcript, do we?

Mr. Witt: We don't.

Mr. Kelley: I don't know that he was asked that particular question. I think he was asked for the same information in a different way.

The Court: That's what I thought.

Mr. Kelley: It is my recollection.

The Court: I wouldn't, as I say, attempt to recite the record.

Mr. Kelley: Might I suggest that if Mr. Witt wants to ask him directly if he gave a statement or made a statement to an FBI agent during this period he is talking about and come right to the point instead of going around the barn on it.

The Court: The point was that the question, as I recall the form of the question, was that it covered everything from the beginning of time, and I thought he had asked him previously about whether he ever had in the same kind of a general question. Now, I may be mistaken.

[fol. 746] Mr. Kelley: He did; he covered the whole thing.

The Court: If the question had been directed simply to since he has been here in Denver or come here from Cleveland or wherever it was, he has covered it up to date to Cleveland very specifically, and if the question is limited I don't know that it would be objectionable.

Mr. Witt: What would be the objection?

The Court: The form of the question, as I recall it, and I understood it went clear back to the very beginning of time.

Mr. Deikman: What was his answer to that?

Mr. Kelley: Well, he said if he was asked about it, about these things in regard to Mr. Travis, that he would have told them, but he didn't recall whether he had been asked specifically about Travis. As I recall, that's about the tenor of the testimony.

Mr. Deikman: Then his testimony is inconsistent, because he said he was asked a week ago.

The Court: Where did he say that?

Mr. Witt: No, asked to testify a week ago.

Mr. Deikman: That's right.

Mr. Kelley: That had nothing to do with making statements of what his testimony is.

Mr. Witt: In view of that, Your Honor, I think we can save time. Your Honor, the only objection I gather to the question is that it was asked before, and now we are spending ten times longer than it would take to get an answer out of him, and now in view of the kind of answers we have gotten, and I am not too clear, and we can save time not checking the record, why wouldn't Your Honor consider permitting me to ask him one general question now, not the beginning of time because obviously we are not interested, if the Court please, about the beginning of time. The record is clear that he has testified that he started to [fol. 747] talk to the FBI after he was with Mine-Mill, so that's what we are talking about, and I just want to ask him now, especially in view of his answers about being asked to come here in connection with this trial, one overall question which would be, and Your Honor might improve the phrasing of it, whether he at any time since he first began giving information to the FBI has given information to any person representing the Department of Justice about Travis up to the time he took the witness stand, and that would cover attorneys and –

The Court: I think it may not be in that precise form, but I think I will wait and see the record. What I think you could ask him is if while he was here in Denver he discussed the matter about Mr. Travis, or whatever line you used with anyone. I think that might be specific, but I think he has answered that other question, and I may be entirely mistaken. It may have been the FBI instead of Department

of Justice, or something else, but let's let that rest for a minute.

I don't understand what you mean by offers of proof; I don't know what you mean by that.

Mr. Witt: Well, Your Honor—

The Court: Do you mean you are going to offer this witness to prove something?

Mr. Witt: Your Honor, I am sorry, maybe it is a practice that isn't common here, but I did it pursuant to the practice I understand in the case of the witness Eckert on an issue more or less along the same lines as one of these we have pending with this man, that is, I started to ask him about the UAW, which is the labor union he is connected with. Your Honor sustained an objection.

The Court: I think I sustained the objection right off the bat, and I think this time I said if he could show any antagonism or something between the Union on the theory that it might import some degree of prejudice to him that you could do it, and you asked him and he said there wasn't any, and repeated it several times, and that to me seems to end the thing. Now, I don't know where you want to go from there.

Mr. Witt: I have more specific questions about the situa-[fol. 748] tion in which the two unions have been rivals, including this incident of the Metal Trades Department which I referred to Your Honor, which is a very important incident in recent labor history, particularly as far as Mine-Mill is concerned, so if he says he doesn't know or he says—

The Court: He didn't say that; he said unequivocally about three times, if I recall, that they were not rivals and hadn't been at any time.

Mr. Witt: But then my point is I don't think as I understand the rules of cross examination, I am not excluded by that answer. This man says he is a consultant and conciliator for the hod carriers.

The Court: You can show it by extrinsic evidence; that may be if it is relevant, but you can't argue with this witness about it.

Mr. Witt: I am not arguing with him about it; I am attempting to refresh his recollection.

The Court: Suppose, to take a simple specific case, it seems to me, if you have a witness on the stand in any case and you ask him if it isn't a fact that his relations with the party against whom he is testifying have been unfriendly and he said, "No, on the contrary we have been friends all our life," then are you permitted to go into a series of escapades between them to reflect on that? I don't think so.

Mr. Witt: As I know the rules, Your Honor—I could be mistaken, but this is our position on it—once he says that I think I can then seek to impeach him more to refresh his recollection by saying to him that, "Isn't it true that you and he had a fight on the saloon in June of 1956?" and then if I have other questions along those lines, true, Your Honor, professionally I have to—

The Court: I think you could probably show that by extrinsic evidence.

Mr. Witt: No, sir, I don't see how we could show this by extrinsic evidence.

[fol. 749] The Court: I want to see some evidence on this.

Mr. Witt: Your Honor, that's all they have been doing. Your Honor, just to be heard on it, because I am at this point quite bewildered about the rules Your Honor is pursuing, on your remark that we can go into it by extrinsic evidence, as I see it we can't, because this is collateral, Your Honor; it doesn't go to the—

The Court: That's the first point I was going to raise.

Mr. Witt: It is collateral; that's why we can't do it. If Your Honor wants to let us do it—

The Court: Let me see some law on the subject; I may be entirely mistaken. I am very often, but I think that's the rule, so I want to see some law on the matter of where the witness has positively stated that there is no rivalry or any other adverse relati nship whether then you can continue to cross examine him about extensive matters with respect to whether his answer was correct or not.

Mr. Witt: Your Honor, just this one word on it: It is another aspect or another branch of the same rule which permits you to impeach him with prior testimony. In the same way you laid down a foundation by asking him

whether he remembers testifying in Cleveland so and so and he says no, or he says, no, he said something else; then you show him that. That's to refresh his recollection. The same way here he says he doesn't—

The Court: Let's find some law on the subject; there should be some.

Mr. Kelley: On the matter of offer of proof, Your Honor, I can understand an offer of proof by—

The Court: By a witness. How do you know what this man is going to testify to is more than I know. That's another reason I don't know what you mean by offer of proof.

Mr. Witt: Not by what he can testify to, but what—

The Court: You can come in and say what you want to ask him, but it isn't any offer of proof that I can see.

[fol. 750] Mr. Witt: All right, I will do it either way. Maybe the practice is different, Your Honor, but this isn't proof, of course. I can't be giving testimony, but that's why it is called an offer to prove. In other words. I would say if Your Honor overruled the objection and permitted me to pursue this line what I would be trying to show is the following, and then give the answers.

The Court: You don't know that the witness is going to testify to it, and I think we are just talking about something that isn't here.

Mr. Witt: Of course not.

The Court: If you have a case and one of your witnesses in on the stand and you come to something that there is an objection made, you know what your witness will testify to and you come in here and make an offer of proof and say to the Court, "This witness will testify as follows, and we desire to offer it for that purpose," and then the Court will rule on it on the basis of the offer, but you don't know what the witness is going to answer, and you can't make any offer of what he will testify to if he is permitted to go on.

Mr. Witt: All right, Your Honor, I won't pursue that argument because, as I say, I have been permitted to do it; but then, the alternative to that and the reason why an offer to prove saves time, the alternative to that, assuming you are right on being able to impeach his answer

here, for example, about no rivalry between the two unions, is to ask him the questions I had in mind and then Mr. Kelley will object. Your Honor will sustain the objection.

The Court: The fundamental thing I want to know on that right now, and as I say I am not passing on it, is whether under the law where the witness has said there is no rivalry, whether then you can go on by interrogation and try to show an inconsistent statement with the statement about whether or not there is a rivalry; that's what I am interested in as a matter of law.

Mr. Witt: Do you want us to do that right now?

Mr. Kelley: Your Honor, let me make one statement. [fol. 751] I think this is the law, it is as I understand it, that you can only impeach a witness' testimony as to material matters, and it is not a material matter.

The Court: This isn't a question of impeachment at all; it is a question of interest with the witness, if anything, and it goes to his credibility. It is no question of impeachment.

Mr. Kelley: He is trying to say that he trying to impeach him on this statement that there is no rivalry; now he is trying to impeach him on that.

Mr. Witt: No, Your Honor, Mr. Kelley is referring to—

The Court: Let's look up the law.

Mr. Witt: Just so we will get our position on this last statement made by Mr. Kelley, Mr. Kelley is referring to the rule about not being able to impeach a witness on cross examination by extrinsic evidence on a collateral matter, and that's why this is the way to do it. If the law is that, Your Honor, as Your Honor seems to indicate, that you can do it by extrinsic evidence, we can do it and will be glad to do it.

The Court: If it is a material point. The question he is raising is if it is a material point you can do it, but I don't know whether there is a material point. You can do it by extrinsic evidence on material evidence, but I don't know whether this is. I want to see what the law is on the question that I just propounded. I may be entirely mistaken, but I think there is some limit to what—it would be arguing with the witness about his construction of some state or relationship and what someone else's might be.

Mr. Deikman: Do you want us to dig up the law on that right now, Your Honor?

The Court: No, not right now. What else was there now to be determined?

Mr. Witt: Your Honor, give us a moment. All right, Your Honor, we will dig out the law as soon as we work out where we stand on that question. I have made a note [fol. 752] of the problem we have for chambers, and may I take them in order, if the Court please? I may be wrong.

First, there is pending the matter we discussed in chambers at the end of the morning session, that is, my questions to the witness about his talks with the FBI and about his testimony before a grand jury about the thirteen defendants and in the conspiracy case other than Travis.

The Court: I thought I had ruled on that, haven't I?

Mr. Witt: You did, Your Honor, and again this may be disposed of by the question we just discussed, because there I said I would make an offer to prove, but then in view of what Your Honor just said about the other question about Travis, maybe we better hold that one, too, until we settle the law, because if Your Honor is right about my not being able to make an offer to prove, then the only alternative I can see would be for me to take and go through the other thirteen names and have Your Honor sustain Mr. Kelley's objections.

The Court: I have already sustained the objection to the names you have asked.

Mr. Witt: I want to complete the thirteen names. I will ask Mr. Deikman to check me on this and see whether he agrees. Perhaps we can dispose of that one, if Your Honor wants to, by having the record show at this point that I would ask him the same questions about those thirteen names and that Mr. Kelley objects to all that, and Your Honor sustains Mr. Kelley's objections. All I want to ask him is whether he gave information to the FBI or testified before any of the grand juries about these thirteen people without asking him what he said about them.

The Court: I would sustain the objection to that, and unless there was some showing made that there was something in the situation that would make the discussion of whether one was had or not that would be relevant in

this case, and I would sustain the objection to any cross examination along that line.

Mr. Witt: All right, sir, then I think that's a sufficient record, but the record should show again we could make it clear this morning, that the purpose of asking him about [fol. 753] these other thirteen people named in the conspiracy indictment aside from Travis is that the witness did talk to the FBI or did give testimony before the grand jury about some or all of those thirteen, so that any testimony from the witness that he did not talk to the FBI or give testimony about him before any grand jury would be so incredible as to be obviously unworthy of belief.

The Court: I think, as I pointed out this morning, if he testified before the grand jury or had made statements to the FBI about a post office robbery in Los Angeles, California, with no further showing that it had something to do with this case, it certainly wouldn't be proper to ask him if he talked to the FBI about some witness in those cases or gave testimony before a grand jury about that case, and that's the basis the Court is proceeding on, and the objection will be sustained.

Mr. Witt: All right, and the same problem, Mr. Deikman has something to say. This is on another aspect of the problem, if the Court please.

Mr. Deikman: Your Honor will recall that the Court stated in the presence of the jury that the statement of the witness on page five of the FBI reports or statements given pursuant to Rule 3500 showed no inconsistency.

The Court: I don't think the Court said that, and we will wait and see the record in the morning. I don't think I said that at all. I said I thought it might, and I said it would be a question for the jury to determine.

Mr. Deikman: At that stage of the proceedings, Your Honor, there was some difficulty as to introducing this particular document because the Government objected, as I recall, that it could not be introduced into evidence in so far as it did not show that the witness' statement given this afternoon was inconsistent with the statement which appears in this document.

Now, as I understand Your Honor's ruling you held their objection—

The Court: The whole thing is in evidence now, so that's water under the bridge unless there is something else.

[fol. 754] Mr. Deikman: I am coming to another point. I am not arguing for the Court to overturn anything the Court has done.

The Court: I let it be read in evidence right then.

Mr. Deikman: Yes, Your Honor. I would like—

Mr. Witt: No, they weren't read in evidence.

The Court: Yes, both of them. First I let you read the second sentence, and then the first sentence in evidence.

Mr. Deikman: I am talking about what follows; I think Your Honor should look at this. We may be talking about different things.

The Court: I saw that in there, yes. What is it?

Mr. Witt: None of that has been read in evidence.

The Court: But it is in evidence; anybody can read it that wants to.

Mr. Witt: That's a different problem.

Mr. Deikman: I am just trying to review the situation because the request I am going to make is this, and I think I ought to be able to explain why I am making this request. I am making the request first, and then I will make my explanation. I request that the judge or the Court reconsider the matters which have been deleted from this report; in view of the witness' testimony on cross examination I am moving that the Court re-examine this report with an eye to seeing whether now any of the excised material is relevant to the subject matter. Now, the reason I am asking that is because it seems to me—now, I could be wrong—but, Mr. Kelley and the Court agreed that Mr. Sanderson, the reference here to Mr. Sanderson, was not inconsistent with the testimony of the witness. The reason was because the witness stated that he did recall that he had made some statement to the FBI regarding a conversation he had with Harold Sanderson on this occasion, and that he also recalled that Sanderson briefed him very briefly about what Mr. Travis said, and the only reason this is in the FBI reports and—

[fol. 755] The Court: No, he didn't testify to that. Let's get straight on the thing. He testified that Sanderson briefed him about the situation in Idaho, that Mr. Travis

later on amplified and adhered to it, and the way that he testified to on direct examination.

Mr. Deikman: I agree with that summary on the part of the Court; that's what I was trying to get at. Now, my point is this, that that would appear to be a consistency rather than an inconsistency in his testimony, particularly in view of the fact that he said the only reason he mentioned this episode at all to the FBI was because they specifically inquired about Harold Sanderson. They didn't specifically inquire about Travis or about Mine-Mill or about anything else. They specifically inquired about conversations he had had with Sanderson, so he gave this conversation regarding Harold Sanderson.

Now, in looking over this report it seems to me that that is an unlikely statement on the part of this witness, that it may not be true, because it does not appear from this report that the report is concerned specifically with Harold Sanderson or that even if this stage of the inquiry were the FBI that the FBI was interested particularly in Harold Sanderson but they were interested in episodes, and that, if we had further material in this report, your Honor, if we had the material that has been excised, it is our feeling that it might bear us out on that. Now, we are not saying that it will bear it out. We are only asking that the Court reconsider the excised material from the point of view of whether that excised material will reveal that the witness was not stating the truth when he said that he was only questioned as to Harold Sanderson.

The Court: Well, your motion for the Court to review the matter will be denied, because the Court to the best of its ability, as I say, the record will be available, if there is any appeal, excised certain portions in accordance with what I understand the rule to be pronounced in 3500, and any discussion of what matter was excised or what was included would amount to a divulgence of the report, so, the motion to reexamine will be denied. I think we had better get the jury in, because I want to excuse them. I haven't completed my examination of this report with respect to this other witness. I have it about two-thirds complete. I think within an hour I can get it completed. [fol. 756] Now, I assume from what you gentlemen for the

defense said you wish to have this witness who is now on the stand come in Chambers and give some testimony, is that right?

Mr. Witt: Yes. We haven't finished with the pending problems in court.

The Court: There is still this one problem and then this question of law.

Mr. Witt: A couple of other things pending from the open court.

The Court: Anyway, what I am thinking about now, I do not want to keep the jury sitting around this late hour in the afternoon, and, if I can get this material so you can have it tonight, say, by 5:00 o'clock, and I think we had better terminate this arrangement now unless it amounts to something directly that may be ruled on. All I know that is held up is looking up this question of law and checking the record about this answer that is relevant right now to his examination in Court, but in view of the fact that we are going to have this examination in Chambers I think we had better let the jury go until 1:30 now, is what I am getting at.

Mr. Kelley: It looks like it.

Mr. Deikman: Until 1:30 tomorrow.

The Court: Yes.

Mr. Kelley: There is only one problem with that decision. If we could clear up the matters that have been before the jury with Mr. Gardner.

The Court: On this one question I don't know what to do until I know what the law is on this one question. Mr. Kelley has pointed out something very real that I overlooked. If he is going to be permitted to answer any further question before the jury and we wait until tomorrow to decide that, then we are going to have to have the jury in and have to talk about this. If we decide that and get this cross examination here in Chambers over, we can go in the courtroom, and, if there is anything more to ask him, all right. If there is not, we can go ahead with the other witness.

[fol. 757] Mr. Kelley: Isn't this question that you still have to ask him one that would properly fall in the category of those to be asked in Chambers, because what you are

doing, as I see it is trying to lay a foundation to prove that the Government hasn't produced all the FBI statements there might be.

The Court: That will be what it is in here, part of it.

Mr. Kelley: But this question—

The Court: What the questions in court are is first whether he can answer this question if he talked to anybody without limitation or what, that is number one, and that will depend on what is in the record. Secondly, he wants to interrogate him further about the relationship between this Hod Carriers Union and the Mine-Mill Union.

Mr. Kelley: Yes.

Mr. Witt: Then there are a couple of others that I mentioned.

The Court: What others?

Mr. Witt: We have pending from court another aspect the same page Mr. Deikman just referred to from the FBI material, page 5. That is with respect to only the first sentence of that paragraph, your Honor.

The Court: The whole thing is in evidence.

Mr. Witt: Will you bear with me? It is not a question of admitting this in evidence. It is a question of being able to ask him questions about it, and your Honor stopped me on Mr. Kelley's objection on this first sentence which states that in regard to the Wallace-Kellogg, Idaho, area, Gardner stopped in Denver to confer with Harold Sanderson and Maurice Travis, and when I asked him about that Mr. Kelley objected, and what I want to show before the jury is that despite the testimony he was asked by the FBI only about Sanderson and that here in telling the FBI—

The Court: You can read that to the jury and argue anything you want to about it.

[fol. 758] Mr. Witt: I want to go on and ask the witness questions about it, because, and that is what your Honor is stopping me from doing—

The Court: I don't recall anything like that.

Mr. Witt: —because what I want to show and ask him questions is that he did tell them that he stopped in Denver to confer with Sanderson and Travis, and then I want to ask him whether when he made that statement to the FBI

he went on and told them only what Sanderson told him and didn't tell them what Travis told him.

The Court: I think that is just purely argumentative. We can take that up. Anyway, I think I will go in and tell the jury to come back at 1:30.

In Chambers

The Court: As I recall, where we left off last night among other things was to enable everyone to look at the record to see whether a question Mr. Witt asked which I think appears on page 1230 of the record had been previously answered, and the Government objected on the basis that the question had been answered several times. The Court could not recall precisely but sustained the objection on that basis and indicated that we would look at the record and see whether the matter had been answered. I think I expressed in the record in the course of the discussion that my impression was that the witness had answered the question. Now, have you searched the record, Mr. Kelley?

Mr. Kelley: I haven't gotten entirely through it, your Honor, but I find on page 1120 in Volume X of the transcript Mr. Witt was examining the witness, and he asked this question: "Take the conversation you had with Travis at his home here in Denver in June of 1953, did you ever tell the FBI about that? Answer: Not that I can specifically recall. I don't think they ever asked me about it that I can recall. If they did, I told them about it. I just don't remember them asking me about it. Question: Did you ever give the FBI any information about your stopover here in Denver in June of '53? Answer: Yes, I think I was asked about it once. Here, again, I am just not too sure, [fol. 759] but I vaguely remember some question about coming to Denver. Question: All right, what do you vaguely remember telling the FBI about the stopover in Denver? Answer: Well, I remember they were asking me specifically about some person here in Denver." And that, it seems to me, that is the part of the same thing he is trying to cover by his present question.

The Court: Well then, on 1121, I made some notes here, I went over that, Mr. Witt asked: "I will ask you again whether you told them anything about Travis in connection with that stopover in Denver in June of '53. Answer: I don't remember whether I did or not. I don't recall telling them, but I could have." And then he interrogated about whether he told them that he stopped at Travis's that night and so forth, and the questions continue about the subject, and then on page 1123 he said: "When was the last time you talked to the FBI in Butte about Travis or Mine-Mill or Harold Sanderson?" And he answers that question. And then the next question, "You don't recall giving the FBI any information about Travis, is that right? Answer: Well, I don't offhand," is the answer. "I don't recall it. It is entirely possible, because they asked me about a lot of people." The question that was asked where we stopped yesterday related to a conversation had in Denver, and also he asked if the information was given to the Department of Justice as distinguished from the FBI. Now, do you have any comments on the subject?

Mr. Witt: Just this comment, your Honor: It is true that I was asking him at page 1120 in that part of my examination generally about Travis, but at page 1230 at which appears the issue we are discussing I was getting back to it, if the Court please, because by that time, that is, between the time he gave the testimony which appears on 1120 and the testimony on 1230 he had testified under my examination that he had been asked by an attorney of the Department of Justice to stop here in Denver after testifying in Cleveland a couple of weeks ago to discuss the question of his testifying in this trial, so, my cross examination by the time I got to page 1230 had opened up that incident. So, I was doing two things at 1230: One, going into that incident which he had opened up by his own answers and, two, I made it the Department of Justice on 1230 instead of the FBI. I broadened it because of his reference to an attorney and my assumption that when he got here at Denver it was probably one of the prosecutors, one of the attorneys instead of the FBI who talked to him. So, from both those points of view I think [fol. 760] I was entitled to go back to it.

The Court: I think probably you ought to be entitled to interrogate on that basis, but I think this question is probably objectionable in the precise form it is, because the question says, "And was that the first occasion you stopped here and you were talked to about Travis? Was that the first occasion since you first began to furnish information to the FBI that you gave information to the Department of Justice about Travis?" The witness hadn't testified that he talked about Travis. I think there should be, I think you could inquire properly if he did on this occasion talk about Travis, and then, if that was the first occasion to furnish it, something along that line.

Mr. Witt: Yes.

Mr. Kelley: I think as to form Department of Justice is a little broad, because the FBI is part of it.

Mr. Witt: The whole question is badly framed.

The Court: If he talked to anyone about Travis.

Mr. Witt: I think I get it. You will give me a chance to phrase that, Judge.

The Court: All right.

Mr. Witt: I do not mean now. I mean when I do it in court.

The Court: Well, yes.

Mr. Witt: I will work it out before we get in court.

The Court: I think it is proper that you can go into the subject. The next thing was about this examination about—I had it here a moment ago and lost the place—this discussion, interrogation about whether the Hod Carriers Union was a rival union of the Mine-Mill. It begins on page 1223. What have you gentlemen to say in support of that this morning? I raised a legal question about going into specific discussion with the witness after he had answered that there was no rivalry between the unions.

[fol. 761] Mr. Witt: Are you addressing yourself to us?

The Court: Yes.

Mr. Witt: All right, your Honor, I did some research on this problem as best I could last night with the very inadequate law libraries which are available here in Denver, and I think I found reference in Wigmore to a rather recent case that is in the supplement, I do not have Wigmore with me.

Mr. Kelley: We have it available.

Mr. Witt: I do not need it. Maybe we will want to get it later, but let me make my statement. First, this subject was discussed in 3 Wigmore Section 953, and there Wigmore is discussing the question of bias and preliminary question that is required if you are seeking to impeach the witness by prior utterance, but in the last sentence in that section just to make the distinction Wigmore says that a preliminary inquiry is required only if you are seeking to impeach the witness by utterances or like we have been doing with respect to prior testimony, but he goes on to say preliminary inquiry is not necessary when you are seeking to impeach him for bias on the basis of conduct or circumstances, and I am now quoting: "* * * such as an assault or an employment by," and I emphasize the word employment, because that is precisely the issue here, his employment with the Hod Carriers.

If the Court please, as authority for that sentence Wigmore cites a Rhode Island case that is rather old, you will find it in the footnote, on page 514 in that Volume 3 which supports us, but I have a more recent case in the supplement, the current supplement to Volume 3, and, of course, Mr. Kelley and your Honor, in connection with Section 953. The supplement in this connection refers to Walker vs. Estate, 74 Georgia Appeals 48, 39 Southeast Second 75 at 77.

In that case the Court said—I didn't have time to read the facts; it doesn't matter, because the opinion seems to me so clear on this point—the Court says, "If the witness is asked whether he has ill will—" This is in connection with bias, and in this particular case it had to do with ill will—"If the witness is asked whether he bears the defendant ill will, if he says 'yes', then you cannot go into [fol. 762] particulars." The Court doesn't explain why, but obviously, the defense has gotten everything from the witness it is entitled to get, and you cannot try cases within cases and get into collateral issues.

Then the Court goes on to say, "If the Court says 'no'—," and this is precisely our problem, "If the witness says 'no', then it is proper to ask about the occurrence which shows the ill will." In the particular case the Court held that since the witness had not been asked the pre-

liminary question, therefore, the foundation not having been laid, the impeacher, the cross-examiner could go into the details. That is even stronger than Wigmore. Wigmore says no preliminary inquiry is necessary. So, we are gilding the lily here with our preliminary inquiry, but in any event whether we are or not this Georgia case holds that once you put the preliminary inquiry and you get an answer "no" then you can go into details.

Finally, your Honor, so that you won't get alarmed as to the extent to which we think we can go on this I think I should make it clear that I have no intention of going into details, but I do have the intention of asking him about specific episodes showing the rivalry between the Hod Carriers and Mine-Mill. I should also remind your Honor in the same connection, because it is part of the same problem, about the witness's answers at this point in the record we are talking about relating to the merger discussions between the Hod Carriers and the Mine-Mill, and, if I am permitted to ask questions about specific occurrences about rivalry, I also intend to ask him a few more questions about the merger discussions to show that the Hod Carriers are not interested merely in raiding, to use the word that is used in the labor movement, raiding Mine-Mill in the particular operations in the nonferrous industry but the Hod Carriers have been interested in several years in attempting to take over Mine-Mill altogether by means of merger or otherwise.

Finally, as I think I said in open court, I want to show that just a month ago when an important body of the AFL-CIO, the Metal Trades Council, was discussing a resolution at its convention proposing that Mine-Mill be given a charter by the AFL-CIO the opposition consisted of only two unions, both rivals of Mine-Mill, one of the Operating Engineers and, two, the Hod Carriers for whom this man works.

The Court: Do you have any comments for the Government?

[fol. 763] Mr. Kelley: Yes, your Honor. In the first place, what counsel is trying to show is some rivalry between two unions, and it is a collateral matter which doesn't, I mean it doesn't follow even if that were true that whatever rivalry

might exist between a union that the witness belongs to and the union that the defendant belongs to would carry over to the witness. That doesn't just follow in natural sequence.

Secondly, if you get into this question, you would have to go into it pretty deeply it seems to me to show the relationship of this witness to the issues between the two unions, and I can conceive of it developing that the witness might testify that the reason the Hod Carriers opposed the merger or whatever was being discussed at that time was because of the leadership of Mine-Mill, and then Mr. Witt would be objecting to it bringing in the Communist issue in that manner.

Now, we have found a case that I think is pretty much on the point. It is Crocker First Federal Trust Company, et al., vs. United States, 36 Federal Second 545. It is a Ninth Circuit case, it arose in California during Prohibition days. The applicable part of the opinion is found on page 546, and I believe because the question may come up again I will read enough of it so the point is quite clear: "The Government witness has testified that he made a purchase of a pint bottle of whiskey at 7:15 a.m. on June 16, 1928, from the wife of the proprietor, stated on cross examination that he was alone when he entered the hotel and when he purchased the liquor. Thereupon, he was asked to write upon a piece of paper in order to identify the handwriting in the hotel register. The Court directed counsel instead to let the witness pick his signature from the book. The District Attorney objected that this was not proper cross examination, and the Court then refused to allow counsel for the defendant to follow this line of examination to which the defendant Sutton excepted pointing out to the Court that the handwriting which shows that the witness had testified falsely and in fact had spent the night at the hotel with a woman registered as man and wife. The witness stated he did not remember what name he gave and did not remember using the name 'Clyde Webber'. Afterward the defendant Sutton testified that the witness was accompanied by a woman and that he registered as 'Clyde Webber and wife'. In view of the evidence it was certainly proper for the Court to require that the witness be shown the hotel register and the disputed signature or at least the oppor-

tunity to identify his handwriting thereon before embark-
[fol. 764] ing in an investigation of handwriting. It is required that a witness be shown documents containing statements alleged to conflict with his testimony before he is interrogated thereon, and the hotel register was alleged to have such a document."

Now, this is the rule of law that I think is applicable here: "Moreover, the offer was to impeach the witness, and a witness cannot be impeached upon an immaterial or collateral matter particularly when it is first brought out on cross examination. It was no doubt proper to allow a broad latitude in cross examination, but the scope of examination is largely in the discretion of the trial court. There was no claim here of that broad right of cross examination but the narrower right of impeachment. In the exercise of that discretion the trial court could and should consider the rule that evidence merely tending to degrade a witness unnecessarily should be excluded." And it cites some California cases.

"The ruling of the trial court was not an abuse of discretion." It seems to us, your Honor, that what counsel is getting into is pretty much collateral, and even if you could establish that there was some rivalry or conflict between two unions, it would not be imputed to the relationship of the witness and the defendant.

The Court: Well, that goes to the initial validity of the ruling on the first question when he asked him about the matter of whether there was a rivalry between the Hod Carriers and Mine-Mill. I sustained an objection on the same testimony when the witness Eckert was on the stand, as I recall now, and I think that was probably the correct ruling. I did, however, overrule the objection to this question, and the thing that I am confronted with now is whether having overruled the objection in the first instance whether they can go into these other matters when the witness has testified there wasn't any rivalry at all, and I think, I wish you would get Wigmore and that case. You can get it in due course. I am not going to stop and get it now. I will before we resume court and make a ruling on it.

Again, as I say, I have considerable doubt about the propriety of letting the thing be gone into in the first in-

stance, as I think about it, but anyway, I want to see those [fol. 765] cases before I rule. I will tell you before we resume what my ruling is on the thing.

Now then, I believe that disposes of all the matters that were left in abeyance.

. . . . . .

[fol. 782] (Mr. Gardner entered the Court's Chambers.)

Mr. Deikman: For the record, your Honor, we are now going to proceed to examine Mr. Gardner to support our position for production of statement under Section 3500, and, so, that is the purpose of this examination. Secondly, there will be sufficient references to the Grand Jury in our examination to also support our motion for production of Grand Jury minutes which has been previously made and which we will again make at the close of this examination.

Mr. Kelley: The Government would object to any evidence in regard to the production of documents under Section 3500 for the reason that the Government has already complied with that motion.

Mr. Deikman: That is the purpose of this examination, your Honor, to determine whether the discretion which has been placed in the hands of the United States Attorney has been in any manner abused or to clarify the question of what are statements. It is our feeling that it cannot be left up to the Government to determine what materials it will or will not produce, that there are materials that we know of which constitute statements under Section 3500 which have not been provided us in relation to the witness Gardner. We could not make that statement in regard to the witness Eckert before we proceeded to examine him, but I can represent to the Court now that we can make that statement in regard to the witness Gardner.

The Court: Well, I mean the Court knows nothing about it, and I assume that what you are going to attempt to establish is the existence of some statement as defined by 3500 that hasn't been produced. Is that what the purpose is?

Mr. Deikman: That's correct, your Honor.

Mr. Kelley: Mr. Deikman has made the statement that he knows that that is a fact. It seems to me—

The Court: He is not testifying.

[fol. 783] Mr. Kelley: It seems to me that he can, if he knows about it, he should state it. How can this witness testify as to whether we have exercised discretion properly, exercised discretion at all?

The Court: I do not think that is the question at all. I think the question simply is, if they can establish there are in existence anything that, any statements that come within the definitions of 3500 that are in the hands of the Government, then they would have a right to ask about its production. I think that is the objective here.

Mr. Deikman: That is our position.

Mr. Vincent: I would like to say that I do not think Mr. Deikman mentioned that any other documents would relate to the direct testimony of this witness. I think he omitted that, and I think that is important.

The Court: That is true.

Mr. Deikman: Just to clarify the record on that, I understand it has been your ruling that we may not go into the subject matter of any statements given to the Government Agents. Now, I may be wrong on that, so, I wish—

The Court: I do not think the ruling is that way. I think that I haven't permitted you to go into the detailed statement, but certainly, as I used in my illustration the other day, if the witness talked to the FBI five years ago about a Post Office robbery in Los Angeles, that certainly isn't involved in this case. It has to be about something that is involved in this case, and you can identify it generally as matters relating to the case when the rule provides it be established it is relevant to his direct examination. You can proceed, and we can probably meet it better with specific objections as you proceed. So, proceed and interrogate him, and I wish, of course, which has been the understanding, that you would not go over matters that we have had heretofore in the courtroom by reference.

Mr. Deikman: I will do my best to bear in mind what has been testified to in the courtroom. If I am wrong about that, I am sure Mr. Kelley or the Court will correct me.

* * * * * * *

[fol. 785] FRED GARDNER, a witness called on behalf of the Government, having been formerly sworn, testified as follows:

Examination.

By Mr. Deikman:

Q. Mr. Gardner, I believe you have testified that you furnished information to the Federal Bureau of Investigation in August of 1955. Now, to the best of your recollection at this time is that the earliest that you furnished information to the Federal Bureau of Investigation?

A. It is.

Mr. Vincent: The Government objects to that unless it is particularized. This is a general phrase "any information".

The Court: I think I will sustain the objection to that. Let's get down to something specific here. I think he testified to that on cross examination.

Mr. Deikman: That is what I point out in my question, your Honor.

The Court: Yes.

Q. Mr. Gardner, did you furnish information to the FBI in August of 1955 regarding your Communist Party experiences?

A. Yes, I furnished information to the best of my recollection about six to nine months after I was expelled from the Party, and I accept August as the date. I don't remember.

Q. You accept August as falling within six to nine months?

A. Yes.

Q. Actually, you were expelled according to your testimony in April or March of 1955, so that August would be at the very least five months?

The Court: He went over this.

Mr. Kelley: That is argumentative.

The Court: He went over this specifically in the courtroom, didn't he?

Mr. Deikman: I recognize that. This is to clarify his answer.

[fol. 786] The Court: All right.

Q. At the time that you were (sic) furnished the FBI information in August, 1955, relating to Communist Party experiences was that—what agent did you talk to at that time?

A. I talked to Zoller.

Q. I beg your pardon?

A. I talked to Tom Zoller, and at times another agent was present.

Q. Are you speaking of more than one conversation or meeting in August, 1955?

A. No, I think the very end of August. There was another meeting, and I think that meeting was with Zoller, and I think Hutchinson was present at that meeting.

Q. Zoller and Hutchinson were present during one interview in August of 1955, is that correct?

A. Yes, sir, that's right. I think it was the very end of August at the very best.

Q. There was only one meeting, as I understand your testimony, in August of '55 that you recollect?

A. Well, I recollect a meeting that took place approximately six months after I was expelled from the Party, and then after that there were other meetings, sometimes over a cup of coffee we talked about something.

Q. But only one in August, 1955?

A. That is all I can recall.

Q. Now, were you contacted by the FBI, or did you contact them?

A. No, sir, I was contacted by the FBI.

Q. Where did the conversation take place?

A. Which conversation?

The Court: You have been over all of this.

Mr. Deikman: In August, 1955, where did the conversation take place, as far as I know there is no reference to that in the record, and I very carefully examined the record, and I think it has to do with what facilities were available for the taking of a statement. Now, oftentimes witnesses will state that they don't recollect—

The Court: Why don't you ask if any of these statements were ever transcribed or ever taken down? One other vice here is that there have been furnished to you, I have no recollection to date, there have been furnished to you certain statements and certain matter that you have referred to. Of course, it has been furnished. This interrogation, as I understand your position, goes to something that hasn't been furnished.

[fol. 787] Mr. Deikman: To make the record clear on that, your Honor has pointed out that we have been furnished with some reports or statements. Now, page seven of the statement that we have been provided with refers to a report made by the witness to the FBI August 29 and 31 of 1955. Now, that refers to two conversations. The witness here is talking about only one. Even apart from that, what I am really getting at now is that this is obviously a composite of statements made during several dates, because it is not only a statement for the period of August, 1955, but also September, December, October—no, wait a minute.

Mr. Kelley: That is—

Mr. Deikman: At least two other months.

Mr. Vincent: That is only his conclusion.

Mr. Deikman: May I finish that, Mr. Vincent?

Mr. Vincent: Surely.

Mr. Deikman: It is our opinion that it is possible that there are reports behind this report, because I can't see that the FBI Agent involved or Agents involved would have remembered without having taken some kind of a statement from the witness the material which they put in this composite report. So, what we are getting at is, were there statements behind this statement?

Mr. Kelley: How would the witness know?

The Court: How would the witness know?

Mr. Deikman: We are entitled to show it by circumstantial evidence.

The Court: I haven't seen anything in what you are asking him that would relate to that at all.

Mr. Deikman: Well, your Honor, I am trying to get down to details about when these conversations with the FBI concerning his Communist Party activity took place in Au-

gust of 1955, where they took place, what the circumstances were so we can tell whether notes were taken.

[fol. 788] The Court: You can ask him that. The simple thing I said, and I am not going to take the time to look at the record, I thought, I think I have a definite recollection he testified where the various talks took place, but you can ask him, I guess the question was, you can reask him where these conferences in August took place or talks.

Mr. Deikman: Yes, sir.

Q. Would you answer that question?

A. As I understand the question, where these conferences took place?

Q. Yes.

A. In the offices of the FBI in Butte, Montana. Now, I would like to just point this out, that there was occasions—Butte is a small town, on those occasions where I might have had a cup of coffee, and we might have talked about fishing and incidentally, the Communist Party. I am not recording those as conferences in the sense that you are talking about.

Q. I agree with you, Mr. Gardner. I don't believe we should go into such matters as conversations about fishing, so, you will take it for granted that I am not seeking that kind of information. I believe you remember, and I think the report was correct—correct me if I am wrong—that there were two conversations in August. Now, were Zoller and Hutchinson present at both of them?

A. I am not sure. I remember that I was first contacted at my home and asked if I would come to the offices. Now, that was all that was done at home. That contact was made approximately six months after I was expelled from the Party, and from March 1 to August 31 could be six months, and that is approximately that time, and I am not trying to fix it exactly at six months or exactly at nine months. I fixed an approximate time there. I was first contacted by them there, and then I went to their offices following that contact at a time specified. Now, there may have been two meetings in August. I don't recall for sure when those meetings took place. If they took place—the first one took place on the 18th of August. I might say there were two there. They

came in the very latter part of August at the best, and I just don't remember even how many of such conferences took place, but I do remember that several conferences took place and those conferences took place in the offices of the FBI in Butte, Montana.

Q. You mention that they came to your home. Is that the same agents?

A. There was one agent stopped by for one minute. He came in the front door, didn't sit down. He asked me if I would be willing to meet with them and talk to them, and [fol. 789] at that time he pointed out to me that I didn't have to, that there was no pressure on me to do that.

Q. All right. Will you try to just answer my questions? I am not objecting to your going into that other material, but I think we will save time if you answer my question directly whether there (sic) was the same agent, because what he said to you about putting pressure on you is interesting, but it is not what I am getting at right now.

Mr. Kelley: I think the witness should be permitted to give what he thinks is a fair answer to the question.

The Court: I do too. He answered the question once already. Proceed. Let's cut it down to a minimum on both sides. If the witness wants to explain, he can.

Q. Do you recall his name?

A. I don't believe I got the name of that agent. I am sure what it was. It was the first FBI agent that I had ever seen him to recognize him as an agent of the FBI.

Q. I believe you testified in Cleveland that an FBI agent was a neighbor of yours?

A. Yes.

Mr. Vincent: That question is improper, his recollection of what the witness testified to in Cleveland.

The Court: I will sustain the objection to that. This examination in here is not for impeachment or something like that or not for the purpose of testing his recollection or anything else. He in effect is your witness to establish what you purport to be the existence of something that the Government denies exists in effect. So, let's go ahead on that basis.

Q. Following the FBI agent whose name you don't recall coming to your home you shortly went to the FBI offices. Now, at that time it was Hutchinson and Zoller that you talked to?

A. Well, I am not sure—

The Court: Mr. Deikman, I do not like to interrupt here. He has said three or four times he remembered this one gentleman but he wasn't sure that the other one was there and didn't know. You stated your question as though they were both there. Now, let's get away from that and go ahead and ask him questions.

[fol. 790] Mr. Deikman: He mentioned both Hutchinson and Zoller. I think you are confused. He said he didn't remember the first FBI agent.

The Court: Didn't you say that you mentioned one man and you said the other may have been there some of the time or something like that?

The Witness: That is exactly what I testified.

The Court: That is the point I am making. You can go back to the record, if you wish, to see it.

Mr. Deikman: Well, I have here in my notes that he said Hutchinson and Zoller, but I do not want to take time to go back on the record.

Q. Were there other FBI agents present during that conversation whose names you don't recall or do recall?

A. I don't recall who was there. I recall that Zoller was in most of the conferences that I had.

Q. I am speaking of this first meeting.

A. I don't remember.

Q. In their office.

A. I am pretty certain that Zoller was there, but I don't remember for sure which ones was at which.

Q. Now, speaking of this first meeting, did your conversation with them at that time relate to your Communist Party experiences?

Mr. Vincent: It has been asked and answered.

Mr. Deikman: If it is answered, I will go on to the next question.

Q. How long did that conversation last?

A. Oh, I don't remember. I would guess it was fairly brief.

Q. Well, did it last more than an hour?

A. Probably less than an hour.

Mr. Deikman: Your Honor, I am not doing this for impeachment purposes, but just to clarify the record, in the Cleveland trial he testified that this lasted—

The Court: How do you know that he did?

[fol. 791] Mr. Deikman: I would like to bring it out. I am not doing it for impeachment purposes. I would like to warn the Court in advance my purpose is not for impeachment.

The Court: Ask a proper question, and then I will rule on it. Then I can tell whether he should answer it.

Mr. Deikman: All right.

Q. In the Cleveland trial you testified in response to the question, "How long did this conversation last," you said, "Probably a couple of hours more or less. It could have been three." Wasn't that your testimony?

The Court: How do we know we are talking about the same conversation?

Mr. Deikman: I am trying to save time, but we will go back to the beginning of it. It takes several pages.

Q. In the Cleveland trial this testimony was given: "I gave some information to the FBI I believe about six to nine months after I was expelled from the Communist Party. Question: Would that be December of 1954? Answer: I was not expelled in '54, so, it wouldn't be December. Question: Would that be December of 1955? Answer: I would rather believe it was sometime early in 1956. Question: And to your best knowledge what day was that in 1956?"

The Court: What has that to do with this? He has testified all about that.

Mr. Deikman: He is testifying about his first meeting in this trial.

The Court: Proceed.

Mr. Deikman: I am talking about his first meeting in the

FBI office. I referred to the fact that during his first meeting he said that the conversation lasted—

The Court: Show me where the Cleveland record is when he estimated the time there with respect to this first meeting.

[fol. 792] Mr. Kelley: I cannot see it is relevant anyway whether it was one or six hours.

Mr. Deikman: On page 811 of the Cleveland transcript when they were referring to the first conversation he had with the FBI he said, "A couple of hours more or less. It could have been three."

The Court: Where does that identify the meeting as being the one he is talking about now?

Mr. Deikman: It begins on page 807 which I am trying to read.

The Court: I am not interested in when he left the Party and all that. When does he talk about the conversation?

Mr. Deikman: That is how he identifies when he first talked to them, he says by when he left the Party.

The Court: If there is nothing more definite than that, if the Government wants to object, I will sustain the objection.

Mr. Kelley: We object to the whole thing. In the first place, your Honor, the direct examination shows that during this conversation he didn't talk about Mine-Mill and Travis, and so, this is all irrelevant, the meetings at which—

The Court: I think that is what he testified to, that he didn't talk about Travis at all. That is what he testified to in the courtroom.

Mr. Deikman: He talked about his Communist Party—

The Court: He said he did.

Mr. Deikman: Look, your Honor, you gave us this material as being the subject matter, and this is the report, this is a composite report of his conversation we are talking about right now. Now, what we are trying to do is get back to his first meeting and see whether a statement was made at that time with which we haven't been provided.

The Court: Proceed and ask him something that relates [fol. 793] to it. I haven't heard anything that even relates to it, as I understand, and I will sustain the Government's objection to this last question.

Q. Do you remember this testimony being given: "Now, after this 15-minute conversation, Mr. Gardner, I then understand a couple of weeks later you went to the offices of the FBI. Answer: Yes, sir. Question: To the FBI office in Butte? Answer: Yes, sir. Question: Was that still in May or was that— Answer: Well, it was in that period of March or April."

Mr. Vincent: Objection, your Honor.

The Court: I do not see that identifies this at all.

Mr. Deikman: Well, they are talking about after this man came—

The Court: I think we had better proceed to some other line. I will sustain the objection.

Mr. Vincent: The last testimony of Mr. Deikman, I move that the last testimony of Mr. Deikman be stricken from the record.

Mr. Deikman: It is not testimony. I am trying to make the record.

The Court: Proceed and ask the witness some question that is relevant to what we have involved here.

Q. During this first conversation in the FBI offices in Butte do you recall whether the FBI agent or agents that you talked to took notes concerning your conversation?

A. I don't know whether they took notes or not. I saw no notes being taken.

Q. Do you know whether any mechanical transcription was being taken of your—

A. They didn't advise me of any such transcription.

Q. Was any stenographer present?

A. No, there was never a stenographer present at any of my meetings with the FBI.

Q. As a result of your conversation with the agent or agents at that time did they prepare anything in writing which they then showed you for your inspection?

[fol. 794] A. No, sir. The only thing I was ever showed—

Q. I am sorry. I am talking about right now.

A. No, sir.

Q. Did you provide them with anything in writing?

A. No, sir.

Q. Did there come a time in which you had a second con-

versation with any agent of the FBI regarding your Communist Party activities?

A. I had several meetings with the FBI in regard to—

Q. Did there come a time when there was a second one?

A. There certainly must have been.

Q. Could you give us a date on that?

A. No, sir.

Q. When in point of time from the first meeting was the—

Mr. Kelley: May it please the Court, this is wholly irrelevant. The report which we gave to them dated 10/7/55 shows that there were interviews on August 29 and 31, September 1, 9, 12, 16, 26, 27, and October 4 and 5 of 1955, and the stated purpose of this is to show that there isn't, that we haven't produced material which may have been recorded. That was the announced purpose by Mr. Deikman, and this is wholly irrelevant to that. Whether there was a second or third it is shown by the material they already have.

Mr. Deikman: I say it is not shown by this material. As a matter of fact, this material indicates that there was material taken other than this.

Mr. Crandall: Mr. Kelley, I would like to just for the record's sake, Mr. Kelley indicates there were interviews conducted on those various dates he mentioned. The face of the report would not necessarily show that there were interviews conducted. Investigations could have been conducted, but it would not—

Mr. Deikman: That highlights why we have to ask these questions.

The Court: I do not think this witness has to if he doesn't recall the nature of the very thing, I don't expect anyone could recall the precise date or the number of meetings that happened a good while ago, if at any of these meetings, ask if anything was done that would bring them in the category [fol. 795] of the report. The Government has furnished this report here. Now, you should not overlook the fact that under 3500 the Court was obliged to excise some of the report, matters that weren't relevant to his direct testimony.

Mr. Deikman: I am not overlooking that.

The Court: That is nothing in the discretion of the Government or the witness. I mean what we are trying to find

out, I apprehend, is whether there are any reports that haven't been furnished coming within 3500 or statements.

Q. In the Cleveland trial the testimony was as follows on page 812; "How long after the second meeting did you talk to them?"

The Court: What is the point, Mr. Deikman? If you will tell me—

Mr. Deikman: I am trying to place a date. July, 1956, was the date we are trying to get at. I am telling the witness it was July, 1956, just so we have a date of his conversation with the FBI and we may be able to tell him what happened.

The Court: Ask him if he met with them, whatever the date is.

Q. Did you meet with the FBI on July, 1956?

A. I met with the FBI sometime during that period, and certainly I am not sure whether it was July, whether it was August or whether it was June, but it was in that period that I had a meeting with the FBI.

Mr. Vincent: If your Honor please, the documents furnished to the defense show that Mr. Gardner furnished a written statement to the FBI in July of 1956.

The Court: The examination ought to go to something that was not furnished and not something that has been furnished. The Government points out that he made a written statement apparently on July, 1956, and you were furnished the statement.

Mr. Kelley: July 16.

[fol. 796] Mr. Deikman: I want to see if it was the same statement, because in Cleveland the examination as to July of 1956 indicated that there was a statement relating to subject matter—they went into subject matter more there, your Honor—which is different than the subject matter which appears here.

Mr. Vincent: That doesn't prove that that testimony relates to the trial.

The Court: The Court reproduced the statement; and the Court is the one that excised the matter that is not in there.

Mr. Deikman: That's right.

The Court: And the issues in the Cleveland trial may have been entirely different. I don't know what they are. There may be something different in there that would be thoroughly pertinent that would have no relevancy here to direct examination.

Mr. Deikman: That would be something only your Honor could determine, whether or not the statement he talked about in Cleveland is the same statement that was provided us here. All I can do is examine him in regard to that statement and then perhaps your Honor will be able to tell whether that is the same statement or another statement. We would not be able to tell. But I think we are entitled to go into it.

The Court: I don't know on what theory you are proceeding. Proceed. I don't see how it establishes anything. The Government has furnished certain statements. To point out what I am getting at, what is omitted from them is no question of inquiry here. The statement is furnished, and if the Court was wrong in excising parts of it, that matter is one that you are fully protected on by the record. What the problem here is, are there any statements the Government hasn't furnished that come within 3500, that is what I am trying to find out.

Mr. Deikman: So am I.

Mr. Kelley: Mr. Deikman has made the statement he of his own knowledge knows that we have statements which we have not produced. He hasn't said that they relate to [fol. 797] this testimony. I think he ought to make that statement clear, because it is a rather serious charge that he has made.

The Court: Well, if he wishes to.

Mr. Deikman: I don't think I have to at this time, your Honor.

Mr. Kelley: I think he ought to make it clear or withdraw it, because you have alleged that we have intentionally withheld material that should have been produced here.

Mr. Deikman: I didn't say intentionally, Mr. Kelley. I think you have a different interpretation of the legal effect of 3500.

The Court: Let's proceed.

Mr. Kelley: If you are making the charge that we have withheld, I think you ought to be specific about it.

Mr. Deikman: I am going to let the witness testify and not you, Mr. Kelley.

Mr. Kelley: I am not the one that wants to testify. I am trying to find out what your charge is.

Q. Do you recall in the Cleveland trial, you testified that you had a conversation with the FBI in July of 1956?

A. Yes.

Q. And what agents were present at that time?

Mr. Vincent: If your Honor please, we still don't have any relation to this trial and to this witness's direct testimony.

Q. It was in regard to your Communist Party activities?

A. Yes, sir.

Q. What agents were present at that trial?

A. To the best of my recollection it was Zoller and Hutchinson although I could be wrong.

Q. I believe you stated that in the Cleveland trial that there were two additional agents, is that correct?

A. That came in from time to time but were not inter- [fol. 798] ested in my specific testimony. They were in there for moments getting information from one or the other of the agents who were interviewing me, and to the best of my recollection they had nothing to do with my case.

Q. They at no time talked to you?

A. No.

Q. Now, at that time what took place in regard to the agents taking notes? Did they take notes?

A. Well, not to my recollection, they didn't take notes. There was a statement prepared afterward—that is the best of my recollection—of which I believe I signed.

Q. You mean that as a result of what your conversation was they then prepared a statement which you then signed?

A. Yes.

Q. Did that statement encompass any material outside of—

The Court: Wait a minute. We are not going to go into a mysterious roundabout way. Show him this statement here and ask him if that is the one he signed at this time that is here in the record.

Mr. Deikman: I would like to approach it—

The Court: If that is the statement he is talking about that you have been furnished, that is the end of it.

Mr. Deikman: We will assume that this is a reluctant witness and that he may want to cooperate with not producing all the statements, if such is the case, that would be the height of foolishness to say, to let him do it, but he can do it.

Q. Is that the statement?

The Court: I do not agree with your observations in the least. What we are looking for is additional statements. You can look at that, Mr. Gardner, and answer whether that is the statement that you signed following this meeting you are talking about here. Is that the statement you signed at the conclusion of that meeting?

The Witness: Yes, I am sure that is the statement. I only signed one statement.

The Court: And that is dated July 16, 1956?

[fol. 799] The Witness: Yes, that could very well be the period we are talking about.

Q. Didn't you testify in the Cleveland trial, Mr. Gardner, that they gave you a statement at that time relative to a case over in Butte?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection. The statement is before you, and you have been furnished the statement.

Mr. Deikman: Well, this doesn't seem to be a statement concerning a case in Butte.

The Court: The statement has obviously had certain matters excised, and the Court did that under 3500, because it had no relevancy to the direct examination. So, the statement has been furnished as required by law as the Court sees it.

Mr. Deikman: Your Honor, I do not in any way intend to trespass on the rulings or to argue with the Court unnecessarily, but I would like to make a statement in regard to this particular point.

The Court: Well, what is it?

Mr. Deikman: Of course, the defendant doesn't know what statements have been excised. From the point of

view of observing the secrecy of the excised material we are not going to trespass on that. All we are going to do is ask him whether or not he stated in the Cleveland trial that the material which he signed then on July, 1956, was relative to a case in Butte. Then, an appellate court can look it over to see whether this is or this is not the same statement.

The Court: The Court can tell very quickly from the substance stated in there there may have been some material conceding argumentatively, but it might have some relevancy in Cleveland but it has no relevancy whatsoever in this case here. The point is that the Government is obliged to produce anything that comes within the statement category under 3500 that relates to his testimony in this case on direct, and then they can say to the Court, "This statement contains other matters that we do not [fol. 800] think are pertinent to the direct examination here or to the direct testimony," and ask the Court to excise it. So, when the statement itself has been furnished that is the end of the inquiry it seems to me.

Mr. Deikman: That's right, and I agree with everything that the Court has said. It is just that I am not going to press it further. I just want to clarify the record on it.

The Court: Yes.

Mr. Deikman: It is our position that it is possible—I am saying it is the case—that he gave them another statement.

The Court: You can ask him that. He said he didn't. That is already in the record.

Mr. Deikman: I want to refresh his recollection about his testimony in Cleveland. It may be that the excised material is the material that he referred to in Cleveland. I am not going to go further than that. I just want to get out of him whether he would say the same thing he said in Cleveland about whatever report he made. I just want the record to show as much at least as it showed in the Cleveland case about any statement he gave in July, 1956.

The Court: I think you need not go into that. The witness answered, and, if I am wrong about this, it will be corrected, that he made no other written statement, and he said at the conclusion of this meeting that you have

been inquiring about that there was a written statement prepared and he signed it, and he has identified the statement that was furnished you as being the statement. So, now go to the next episode.

Mr. Deikman: All right, your Honor.

Q. Prior to this meeting in July, 1956, and after the first meeting in the offices of the FBI in between those two times did you have any conversations with the agents or an agent of the FBI regarding your Communist Party experiences?

A. I am sure I did.

Q. Does anything come to mind as to any—strike that. Where were these conversations held?

[fol. 801] A. Well, sometimes they were held at the coffee shop, and sometimes they were held at the offices of the FBI.

Q. In any of those instances did you see any notes being taken?

A. No, sir.

Q. Did you provide any written material?

A. Never provided any written material in all my history.

Q. Any written material of any kind? Just answer my questions.

The Court: He has answered it.

The Witness: I did.

Q. Was any mechanical transcription taken?

A. There was never any mechanical transcriptions I was advised of or knew of in any meetings that I had with any FBI agents or the Federal Government.

Q. And this meeting in July of 1956, did you have any other conversations with an agent or agents of the FBI regarding your Communist Party activities?

A. I don't recall whether there was or not. I think, let's see, July, actually, I don't recall whether there was any then until recently around October in Anchorage, Alaska, when there were some conversations there. There could have been a discussion a time in between. I just don't remember. Occasionally, they would call me on some matter that had come to mind, and I would answer them on it.

Q. Do you remember testifying in the Cleveland case that you had conversations with them in August, September, October, November and December of 1956?

Mr. Vincent: If your Honor please, that still does not relate to this. We go back now again to information furnished in a case in Cleveland which has nothing to do with the case here.

Mr. Deikman: The record doesn't show that. It doesn't show anything about it except his Communist Party activities.

The Court: I do not see any inconsistency or anything else. We are not involved in that. He said he had conversations. You can ask him that. That goes to his recollection. You can answer the question.

A. As I say, there could well have been conversations [fol. 802] with the FBI during that period. Now, certainly, during that same period I met FBI agents from time to time. As I said, Butte is a small town, and there were several agents in Butte, and it was almost impossible to go downtown without meeting one of them at noon particularly or in the off hours. That happened frequently.

Q. During those occasions in August, September, October, November, and December of 1956 did any of the agents take any notes?

Mr. Crandall: He has answered that.

The Court: I think I will let him answer.

Q. With regard to conversations?

A. To my knowledge the only time the notes were ever taken—

Q. I am asking only about that period.

The Court: There is no use of taking the time of the Court to ask him about these things when he said there was never any stenographer present or any transcription taken.

Mr. Deikman: He hasn't said that.

The Court: You can answer the question about notes. There is no use of going over the thing categorically when he has made an inclusive answer. I am not sure he answered as to notes.

A. I wanted to clear that up, that the only time that notes were ever taken to my knowledge was the one time when after a conversation a statement was prepared. There was no time to my knowledge in my associations with any of the agents were any notes taken. Now, they might have gone back to the office and made notes on the basis of it or after I left the office. They may have made notes on it. I have no knowledge of any notes being made except the one time.

Q. In Anchorage, Alaska, in December of 1957 did you have conversations with the FBI regarding your Communist Party activities?

A. Yes, I had some conversations in the latter part of 1957 in Anchorage, Alaska, regarding my Communist Party activities.

Q. Did you make any statement at that time?

A. Yes, I did regarding specific individuals.

[fol. 803] Q. Was there more than one statement?

Mr. Vincent: If your Honor please—

The Court: I do not know what you mean by statement. Did he discuss this matter orally or what do you mean by statements?

Mr. Kelley: Well, even so, your Honor, it is irrelevant unless he is asking about anything that concerned his testimony on direct.

The Court: I think he did that preliminarily. Was it in the nature of a discussion or what took place, that is what he can ask. But the use of the word "statements", I do not know whether he is using that under the technical—under 3500 or he just means, did he talk about anything. You can proceed.

Q. Try to answer the question yes or no. Did you sign anything in writing there in Anchorage, Alaska, relating to your experiences in the Communist Party?

A. Yes.

Q. Was there more than one of such writings?

A. Yes.

Q. Could you tell us how many such writings there were?

A. I don't remember. There were six, seven, eight. At that time they were asking about specific individuals.

Q. I am sorry, I am not asking you, it has already been determined that we can't go into the subject matter in detail, Mr. Gardner. So, if we can't examine you as to the—

The Court: You are going to have to show that they had something to do with his direct testimony in this case. You can ask him if the subject was mentioned in the direct testimony of this case or something.

Mr. Deikman: Your Honor, that has already been established. They relate to his Communist Party experiences, and he has testified as to—

Mr. Kelley: That wasn't the subject of the direct examination at all, his Communist Party experiences.

Mr. Deikman: Well, maybe I am wrong on this, and I [fol. 804] would appreciate the Court letting me have its opinion, isn't it correct that his Communist Party experience or activity are (sic) the subject matter of his direct testimony?

The Court: Well, the testimony is here to speak for itself. I do not know what these statements are he is talking about. As I used the oft-expressed one, they may have been talking about something entirely far away from this case.

A. We were far away.

Mr. Deikman: Your Honor, we will make an argument on this later, but I will ask this question: How many individuals did the statements relate to?

Mr. Vincent: If your Honor please—

Q. —in the Communist Party.

The Court: I will sustain the objection to that. You can ask him if they related to Mr. Travis.

Mr. Deikman: I think that calls for a conclusion on the witness's part.

The Court: Well, I don't know. The other would call for a conclusion too, if you ask him specific names. We are not going into any investigation he made about Joe Doaks or Jim Smith or something unless there is some relevancy in connection with this case.

Mr. Deikman: I think it is for the Court to determine whether it is within the subject matter of this case and not the witness.

The Court: You can ask him if any of them pertain to Travis, of course.

Mr. Deikman: Your Honor—

Q. At that time do you recall whether any of the statements mentioned Mr. Travis?

A. None mentioned Mr. Travis.

Q. Do you recall whether any of the statements mentioned anybody who was employed by Mine-Mill?

[fol. 805] Mr. Vincent: We object to that.

The Court: I will sustain the objection.

Q. Do you recall whether the statements mentioned anyone concerning whom you have testified in this court?

Mr. Vincent: We object to that, your Honor. That question is too broad.

The Court: I do not know—

Mr. Kelley: Unless it related to an incident that he testified about.

The Court: Unless he testified to something that related to them. I think he can answer that question.

A. I don't recall any of the statements related to anybody I testified to here in court. There were several statements, and the statements were about specific individuals and not actually about activities. The activities were only incidental to the statement, and I recall none that might have related here although I say, again, that is the best of my recollection. I can't recall a thing—

Q. In other words, to the best of your recollection it might relate to—

The Court: No, he didn't say that.

A. To the best of my recollection it doesn't relate to anything testified here in court.

Q. Your answer, in other words, to that, if I understand it, is, "I don't recall—"

The Court: The answer is here. You need not translate it. The answer will stand. You can argue it. That is just plain argument.

Q. What is the name of the agent with whom you conversed and gave a statement at that time?

Mr. Crandall: Objection, your Honor.

[fol. 806] Mr. Vincent: That is not material. He hasn't shown that that relates to any of these in this trial.

Mr. Deikman: I am prepared to argue it now if you want me to.

The Court: Yes.

Mr. Deikman: I think it requires a reading of your— May I use your copy, may I use your copy of the Act?

Mr. Vincent: Surely.

Mr. Deikman: I think it requires a reading of Section 3500 very carefully, your Honor. I know we have gone over this act before, and I am not trying to repeat arguments that have been made before, but I think it is clear from this Act that, "after a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement of the witness in the possession of of the United States which refers to the subject matter as to which the witness has testified." Then the Act provides that, "If the United States claims that any statement ordered to be produced under this Section contains matter which does not relate to the subject matter of the testimony of the witness, the Court shall order the United States to deliver such statement for the inspection of the Court in camera." And then it is up to the Court to determine whether or not that statement does relate to the subject matter, so that my point is this: It is not up to the United States Attorney to decide whether or not statements relate to the subject matter, but this Act requires the production of all statements made by the witness to any agent of the Government, all statements regardless of whether it does relate to the subject matter or not, because it is up to the Court to determine whether it relates to the subject matter. That is why this provision is in the Act providing that the Court shall inspect the

statements to determine whether or not the statements contain material falling within the subject matter.

So, by Mr. Kelley stating that these statements do not relate to the subject matter, he is violating the intent and purport of this Act. Now, Mr. Kelley took somewhat offense when I said similar statements as to this earlier. I think [fol. 807] it is clear now. I am not saying Mr. Kelley is being intentionally deceptive. I am saying that he is interpreting the Act differently than we are, and I think we are interpreting the Act correctly. The Act requires the production of all statements made by the witness to any agent of the Government, and then it is up to the Court to determine whether it falls within the subject matter.

Now, we have just had testimony on the part of this witness that he has made statements to an agent of the Government. He does not recall, he doesn't think that he gave any material relating to this case, but he doesn't recall whether he did or not.

The Court: That is not my understanding of the testimony at all.

Mr. Deikman: I would appreciate it if that were read back.

The Court: He said they were far distant and unrelated to the subject matter of this case.

Mr. Deikman: That is a legal conclusion on his part. It is up to your Honor—

The Court: The unreasonableness of your position is so apparent to me that I do not think you need to argue it any further. If you take the case of an FBI Agent, I mean an operative, or whatever they are called, he probably in the course of ten years would make 100 investigations and make 100 reports on 100 different detached cases. Now, if you take your analogy here or your argument, the Government would be obliged to produce 100 reports on 99 cases that had nothing to do whatever with the transaction that was under investigation, and then according to your theory the Court from the 100 absolutely detached cases would have to say, "Well, this has nothing to do with this." In other words, according to your analysis every report that anybody ever made about anything would have to be produced, and I do not think that

is the purpose or the theory or the intent of the law. It has to be with respect to something under the statute that relates to the witness's direct examination, and, if the Government had an FBI Agent that today investigated a Post Office robbery in Los Angeles and last week was in-
[fol. 808] vestigating a sale of some money orders or something in Palm Beach, Florida, and we have a trial here involving a Post Office robbery in Denver, I think that would not of necessity be produced. But using that for analogy they would not have to produce these Los Angeles and Palm Beach, Florida, reports to the Court at all. It would be on matters that relate to the subject here. So, I do not think there is any basis for that argument at all.

Mr. Deikman: With all due respect I do not think the analogy you suggest applies, because we are not asking for all statements that an FBI Agent has relating to all his investigations. We are asking for all statements made by this witness.

The Court: Well, but the statute says pertaining to his direct examination here. The witness has expressly testified that these were not connected with any matters mentioned in this case or were entirely in another field.

Mr. Kelley: The Judge's analogy is a perfect example. If the FBI Agent were going to testify, say, on a Dyer Act that he had investigated and he investigated 100 other Dyer Act cases, under your argument we would have to produce the 100 other investigative reports on other Dyer Acts that were not related to this violation that is on trial.

Mr. Deikman: At no point in your analogy do you mention anything about a witness in particular.

Mr. Kelley: The FBI Agent is the witness. They testify.

The Court: Where an FBI Agent was called, just to illustrate the absolute unreasonableness of your position—

Mr. Deikman: That analogy falls down, because the FBI Agent would be—obviously would not be giving reports to himself. We are asking about reports made to a particular FBI Agent. I haven't been allowed to ask what the name of the agent was, and that is the question we are coming to. But I submit, your Honor, that a correct interpretation of what this witness has said, and I ask that his testimony be read back by the reporter, is that he

does not recall having given any statements regarding persons mentioned in this trial which the reverse is that it might have been mentioned in the statements but he doesn't [fol. 809] recall. Now, he didn't say that he didn't give them any statements in regard to persons who were mentioned in this trial. He said he didn't recall whether he did or not.

The Court: The evidence is here. Proceed if you have any further questions to ask him. The question I think was with what agent he talked on that occasion. The Government objected to that. What is the basis of the objection to that?

Mr. Kelley: We don't care if he gives the name of the agent.

The Court: I think he can answer the question, what agent it was you had these talks with up in Alaska.

Mr. Kelley: The whole line of questioning is irrelevant.

A. I met this fellow once. I think his name is Cochran. I do not recall his first name, but I am fairly certain of his last name. I gave him no statement relative to this trial.

Q. Now, subsequent to— I beg your pardon. I didn't hear that last answer.

Mr. Kelley: He said he gave him no statement relative to this trial.

Mr. Deikman: For the record I move that answer be stricken, because the opinion is an uncalled for opinion and conclusion.

The Court: The answer can stand. The objection is overruled. He has testified to the same thing I think several times, but proceed.

Q. Now, subsequent to your giving the FBI statement in December of 1957 in Anchorage, Alaska, did you have any other occasions to have conversations with the FBI regarding your Communist Party experiences?

A. No.

Q. Now, you have testified that you testified in the Cleveland conspiracy case previous to the testimony in this

case. Were there any other criminal cases in which you have testified?

The Court: Well, do you mean along this line, or do you mean some burglary case or what do you mean?

[fol. 810] Mr. Deikman: This is preliminary. I will ask him next—

The Court: I do not think the witness is obliged to go back through his life where he has testified in dozens of criminal cases. You have got to point it up and have something more specific than that.

Q. Other than your testimony in Cleveland and this case has your testimony been elicited in any criminal case regarding your experiences in the Communist Party?

Mr. Vincent: We object to that. It is the same question in a different form. It means the same thing.

Mr. Deikman: It relates to the Communist Party, and that is the subject matter.

Mr. Kelley: No, that wasn't the subject matter of his testimony.

The Court: I do not think it was either.

Mr. Kelley: That is where the false premise is.

The Court: I would not say it was the subject matter of his testimony.

Mr. Deikman: It is not the entire subject matter. We are not making that contention.

Mr. Vincent: Does that include state court, city court, JP courts?

The Court: Why don't you ask him if he has testified in any case that involved alleged violations of the Smith Act or Taft-Hartley Act and get it down to some area?

Q. Will you answer that question?

A. I testified in Cleveland in the conspiracy trial there, but I—I don't quite understand the question. Does that include grand juries that I previously testified to?

Q. No, just open trials.

A. Yes.

Q. Does that complete your answer?

A. Yes.

[fol. 811] Q. Now, you also testified that you appeared before the Denver Grand Jury in the summer of 1956, the

Cleveland Grand Jury in January of 1957, and the New York Grand Jury in December, 1956 or around that time. Were there any other grand juries in which the subject of inquiry was a violation of the Taft-Hartley Act, the Smith Act or any other act of that kind before which you appeared?

A. No, sir.

Q. Previous to your appearance before the Grand Jury in the summer of '56 in Denver did you have any conversations with any attorney for the United States Government regarding your Communist Party experiences?

Mr. Kelley: I object to that as irrelevant whether he talked to attorneys or not.

The Court: I think I will let him answer the question.

A. I am not sure that I understand it. Is the question, did I talk to any attorneys for the United States Government prior to my coming to Denver?

Q. Yes, and I will add onto that in relation to your testimony before the Grand Jury.

A. Yes, I did.

Q. Now, was that one attorney or more than one attorney?

A. I think there were probably two attorneys that I spoke to at a couple of different times.

Q. Do you remember their names?

A. One of them was Mr. Broome, but I can't remember the other fellow's name.

Q. Would it refresh your recollection to mention the name of Mr. Heflin?

A. Yes, I believe that is the other one.

Q. On how many occasions at that time did you see those attorneys?

A. Well, there were probably two or three different occasions that I seen them. I was asked to come here to Denver, and I talked to them here in Denver.

Q. How long did your conversations last on each day?

A. Oh, gee, I don't remember, probably a couple of hours, maybe longer. I don't remember.

Q. It was—did you observe Mr. Broome taking any notes?

A. No, sir, I never have observed Mr. Broome taking notes. He has a terrific memory.

Q. Did you observe Mr. Heflin taking notes?

A. No.

Q. What about Heflin, did he take notes?

A. Not to my knowledge he didn't. What he did after he left me, of course, I have no knowledge.

[fol. 812] Q. When you said that you had never provided anything in writing to any FBI Agent did you also include in that answer a blanket statement in regard to United States Attorneys?

The Court: Ask him the question.

Mr. Deikman: I didn't want to go back over the same question.

A. Yes, I never gave any United States Attorney anything in writing.

Q. Well, did they ever—did Broome and Heflin on this occasion prepare anything in writing and return it to you, submit it to you for your inspection?

A. Not that I can recall. I am sure they didn't.

Q. Now, your answer before about mechanical transcriptions and stenographers, would that apply to the United States Attorney?

A. That would definitely apply.

Q. In other words, that is a blanket statement in regard to any agent of the Government?

A. Yes.

The Court: This testimony about these Alaska statements, I want to see or give consideration to whether there is anything in those that the Government might be giving some thought to the subject of those, I don't know, I want to see the testimony. It would be my impression the testimony shows that in the witness's judgment at least they are entirely unrelated to this thing here and so forth and so on. He made some answer about, I am not certain about that phase of the answer, and, if there is any possibility that they would have anything to do with this, it might be advisable to produce them. You can be thinking about that and be able to state your objection.

Mr. Kelley: All right.

Mr. Witt: Your Honor wants to come back at 1:15?

The Court: Yes, and I will tell you what I think about this other business.

Mr. Witt: Just to clear the decks on that, I said I was going to check on that one thing. I have, and I am withdrawing that problem, so, the only problem we have relates [fol. 813] to the citations I gave you on the problem of the Hod Carriers.

The Court: Going to that matter of specific questions about the relationship between these two unions?

Mr. Witt: That's right. Then, your Honor, also we would like you to tell us at 1:15 how you feel about our use of these documents, because it is our present intention to use them freely without restriction.

The Court: Before we recess today I will get to that.

Mr. Witt: All right. If your Honor can do it at 1:15, because I may have someone working on them this afternoon.

The Court: Will someone leave me a copy of this Cleveland transcript among other things?

Mr. Kelley: They are the only ones that have it.

The Court: Where it indicates there is any restriction on the use—

Mr. Vincent: This is only the portion pertaining to his testimony.

The Court: Another thing I wanted the Government to do, I do not know whether they can do it between now and 1:30, is to check and see if they can find out about any other cases in which this problem has come up and what was done.

Mr. Vincent: I will check on that.

The Court: If you gentlemen can find out anything, that goes for you too.

Mr. Witt: We have given you the conclusive precedents on that.

Afternoon Session 1:15 p.m.
In Chambers

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Kelley: There is one thing that might be in order at this point. Mr. Deikman has made the allegation that

[fol. 814] the United States had statements in its possession relating to the testimony of the witness Gardner which it had not produced to the Court, and there were statements made by the witness Gardner in Anchorage, as he stated, which we maintained have no bearing on his testimony on direct examination, but we want to submit them to the Court because of the charge that has been made and ask the Court to examine them, and, if the Court feels they belong in the record at all, that they be sealed. However, we feel that they are so remote that there would not even be any reason to seal them, but we would like to submit them to the Court before they continue with their cross examination so that the Court—

The Court: You have them physically available?

Mr. Witt: Before the cross examination in Chambers you mean this afternoon?

The Court: Yes, that was this morning.

Mr. Kelley: That's right.

Mr. Deikman: May I say a word for the record? It seems to me Mr. Kelley is being unduly touchy about my reference to their possession of statements. I do not know how many times I will have to repeat it to convince Mr. Kelley, but I was not in any way attempting to allude to any impropriety on the part of Mr. Kelley or any United States Attorney. All I was doing was pointing out that our interpretation of the statute obviously is much different than Mr. Kelley's, and under our interpretation these statements should have been provided to the Court. There are no charges in any way.

The Court: I think mechanically what we had better do, I want to get rid of the Jury since we know we are going to have a short session with them, and then you can give me the statements, I can look them over, and then when I have completed looking them over and decide about the matter we can come in Chambers, and I will announce what my views are then about the matter.

Mr. Kelley: Suppose that Mr. Deikman's interpretation should be right and mine wrong, they might want to use them if you gave them to them on cross in open court.

[fol. 815] The Court: Well, there may be some sense to

that. While the Jury is here maybe we had better let the Jury sit around and you can give me the statements, and I will look at them right now.

Mr. Deikman: There will be other statements that I believe, now, in this case I don't know, but I believe we will be able to show through Mr. Gardner that exist other than those in Anchorage.

Mr. Kelley: You may be referring to some notes that were taken by an attorney on the Cleveland case.

Mr. Deikman: I didn't come prepared to argue this thing in Chambers. My recollection is—

The Court: How long is it going to take to develop this thing that you think you can develop by examination of Mr. Gardner?

Mr. Deikman: About 20 minutes.

The Court: As much as I dislike to have the Jury sitting around I think we had better do that if there are some other things and get Mr. Gardner back in here. They suggested the possibility of anything that ought to be produced. You ought to know before you cross-examine him in court.

Mr. Witt: May I finish off my problem so I can get ready for open court while you are getting ready for this other thing? I would like to go ahead and prepare especially since this Hod Carriers problem is—

The Court: I have concluded after looking the whole matter over that the Court was wrong the other day in letting the matter be gone into. Apparently it is the view of the defense that ill will of the witness against the defendant in this case, Mr. Travis, might be inferred from the circumstance that there is some rivalry between the Mine-Mill Union which formerly employed Mr. Gardner and with which Mr. Travis was associated and the Hod Carriers Union as has been referred to with which Mr. Gardner is presently associated and employed. I think, as I mentioned at the time this thing, this problem came up in connection with the testimony of the witness Eckert, that any pos- [fol. 816] sible inference that might arise from that circumstance is too remote to be considered in this case. Mr. Travis is the defendant in this case, and the ill will that can

be shown is a personal ill will between the defendant and Mr. Travis, and their respective association with these unions I think would be getting out into the collateral fields.

So, what I am going to do is instruct the Jury that they disregard all of this testimony about the rivalry between these two unions.

Mr. Witt: In view of that, your Honor, and to preserve our record on it may I say this: Since you have gone back to the witness Eckert and referred to the distinction between the personal rivalry and the union rivalry, if we were permitted in the cases of both Eckert and this man to go into it, we would show in the case of Eckert he was and has been personally involved in the rivalry between the UAW and Mine-Mill, and in the case of Mr. Gardner that he also has been personally involved, and, in fact, if we were permitted to go into this, your Honor, I would be getting back to what Mr. Gardner said yesterday about the discussions between the Hod Carriers and Mine-Mill about merger and show that Mr. Gardner personally played a role in that in top level discussions in 1956 after he became associated with the Hod Carriers, and he had, we would ask him about a conference that he, Mr. Gardner had with the Secretary-Treasurer of Mine-Mill, the present Secretary-Treasurer, Mr. Pezzati, in the Hotel Finland in Butte in 1956 at Mr. Gardner's suggestion or invitation to Pezzati so that both in Mr. Eckert's case and in Mr. Gardner's case we could show personal involvement.

The case I referred to this morning or, rather, the Wigmore sentence I referred to this morning from Section 953 referred to the fact that you could show bias by nature of employment. This goes much further than that, not merely by employment, but we could show in the cases of both of these witnesses, and we will have the same issue with respect to Mason, the same issue with respect to Horie, that all four of these people have been personally involved in attacking Mine-Mill, attempting to destroy it, and doing everything they can to hurt Mine-Mill and to injure the officers and former officers of Mine-Mill including Travis.

The Court: Of course, your own statement of the thing I think illustrates better than anything I could say about [fol. 817] the collateral issues that would be involved in going into this thing. The Mine-Mill & Smelter Union is not on trial in this case in any sense. The antagonism between the unions whether it exists in fact or whether it doesn't is not anything that would relate to this case. If it was a case, say, that involved rights between them, there might be some basis for it. Mr. Travis is individually a defendant in this case, and the only possible basis for showing any feeling on the part of a witness who appears for the Government must be limited to a personal feeling with respect to the defendant, and these matters as your own synopsis of what you are trying to do shows, would indicate that it would not establish any personal animosity at all or personal feeling as against the defendant. So, I think the Court will, as I say, instruct the Jury to disregard this episode in this witness's testimony.

Mr. Witt: I am sorry, your Honor, just this one word if you will permit me, I don't want to press it, your Honor has made his ruling, but to make the record on it, as we see it, and as we know it, not only from this case, we know it from what we know about the witnesses before the Grand Jury in the conspiracy case pending before your Honor, we know it from the very extensive proceedings which have taken place before the SACB, that the people who have appeared as witnesses for the Government against Mine-Mill as such or against people like Travis affiliated with Mine-Mill or officers or past officers, practically all are people in the labor movement and concerned with destroying Mine-Mill, and the way we see it is that not only in this case but in other cases there has been cooperation between the Government and specifically the FBI and these people like Gardner and Eckert and Mason and Horie, Ortiz, if they produce him, to destroy Mine-Mill, and if in order to do that to get a conviction of Mr. Travis, these people like Mr. Gardner will cooperate in that enterprise.

The Court: Now, is there any point—

Mr. Kelley: I think it ought to be cleared for the record that this citation that Mr. Witt set forth of Wigmore, Sec-

tion 953 doesn't relate to what he is talking about at all. It relates to prior utterances of the defendant, not relationship of unions or anything else.

The Court: No. As a matter of fact, I didn't think it was [fol. 818] necessary to get into the legal argument on the thing, because I am satisfied the whole thing is collateral, but I don't believe that that citation would justify the course indicated anyway, but I am going behind that. I think it is entirely collateral, going into collateral matters, would just open up the field for something entirely collateral to the thing, and there are no inferences, considerable inferences that could be developed in the thing at all. But let's go to the next point. What is the next point?

* * * * * * * *

[fol. 821] Mr. Witt: But I am not going to come back to the subject. I think that takes me out of the picture for the time being. Just so we will be clear on the procedure aside from statements under Section 3500 we have the problem of making the record with respect to our position on grand jury testimony. May we preserve just that part of it until after we have finished with the open court cross examination, because we may get something in there? He will complete his cross examination now, but we want our opportunity to state our position on that after we are done with Gardner in open court.

The Court: I guess that is the position, but, still, if there is going to be any production, I do not know what will develop. I think we had better go through everything here on the testimony level so we know if there is anything that is going to be asked to be produced. That is to be the end of the examination of this witness except for—or there may be further examination in here, but at least we do not want to have to go back before the Jury with this witness.

Mr. Witt: We understand it, but we want to come back in Chambers and make our motion on grand jury testimony.

The Court: We will see how we progress on that, and then we will work out some satisfactory plan.

Mr. Deikman: May I proceed?

The Court: Yes, you may proceed.

FRED GARDNER, testified as follows:

Examination.

By Mr. Deikman (Continued):

Q. Mr. Gardner, did you have occasion to speak to an attorney for the Government by the name of Greenhalgh—[fol. 822] I do not know if I am pronouncing that correctly—on or about October, 1956, respecting your activities in the Communist Party?

Mr. Kelley: The Government objects to that on the basis of the form of the question.

The Court: I will sustain the objection. I think you have to, as I say, I think you are going to have to, and I think it has been generally accepted that the precise details of the matter, of the statement or of the conversation should not be gone into, but there should be sufficient indication that it had something to do with this case.

Mr. Deikman: All right. In other words, you are sustaining the objection because I say respecting the Communist Party?

The Court: You can say relating to Travis or relating to the subject matter of this case or something like that.

Mr. Kelley: His testimony.

Mr. Deikman: We take the position, your Honor, that his activities or experiences or history in the Communist Party relate to the subject matter in the Travis case.

The Court: I do not know what you mean by that. That is the trouble. I do not know what you mean by it. I can think of a hundred things. He might have gone to a specific meeting, say, which had no relation to this and testify about what happened there that would not by any remote theory be connected with this case and still come in that category.

Mr. Deikman: In this case he testified that he joined the Communist Party at such and such a date, he gave reasons why he joined the Communist Party, he spoke of his experiences unrelated to Travis in the Communist Party. The Government thought it was material, they regarded it as part of the subject matter of his direct examination, for

that reason it is in the record, and we regard it now as something that we can go into as the subject matter of his testimony pertaining to this case.

Mr. Kelley: I do not think you can point any of that out in the record. In the first place, all we covered on his Com- [fol. 823] munist Party business was that he was a member from about 1933 until 1955. The testimony didn't name anybody as being a member of the Communist Party. The only reference to Mr. Travis being a Communist was in the words of Mr. Travis brought out in these conversations he had. The witness was not even asked if Mr. Travis was a member of the Communist Party. There is no background, no reason why he went in or anything in that manner in the direct testimony.

Mr. Deikman: Mr. Kelley neglects to mention that they also brought out on direct examination when he left the Communist Party, and the FBI reports which have been provided or statements under Section 3500 go into how he was expelled from the Communist Party if he was.

The Court: You can ask him if it related to any of those subjects. That is exactly what I am pointing up, not just the field of activity but if it relates to anything that relates to this record here in the matter, why, ask him specifically about it.

Mr. Deikman: May I ask him first about having talked to Greenhalgh and that is just preliminary, and we will get down to the subject matter?

Mr. Vincent: If your Honor please—

Mr. Deikman: It is too long a question, your Honor, I do not have that high mentality to be able to think of sequence after sequence in one sentence, but I will try.

Q. On the occasion that—strike that. Did you have occasion to talk to an attorney for the Department of Justice by the name of Greenhalgh in which the subject of your conversation in part was your joining the Communist Party of the United States or your expulsion from the Communist Party of the United States or the dates related thereto in October of 1956?

A. Well, the only thing that I recall in the discussions with Greenhalgh at that time—

Q. I am asking you whether you did or not.

A. I cannot answer the question by telling you that at that time I discussed with Mr. Greenhalgh the matters that were testified to in the Cleveland conspiracy trial. Now, I don't know if there were any of the fringe things, and I [fol. 824] doubt very much if there was, that was discussed there. The main subject of discussion with Greenhalgh was what I testified to in the Cleveland trial.

The Court: Well, there is no use of going into this until you show something in the nature of a statement. Ask him, was there any transcribed, was there anything written down or anything else. I mean just a conversation even about some matter in this case would not be producible. Go ahead with that question and develop what happened.

Mr. Deikman: I will make that the next question.

The Court: All right.

Q. In preparation for the trial which you have just mentioned did you have occasion to see notes prepared by anyone, any agent of the Government in relation to your testimony in the Cleveland trial?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection, because I don't think the question says what Mr. Deikman intends it to say. I mean you can ask him if any notes of his interview were made and submitted to him, if they had any and produced any notes of his own interviews. I mean the implication there in your question, as I understood, might be with respect to somebody else's testimony entirely.

Q. Did you follow the Court's question?

A. I can say this: that I of my own knowledge I know of no notes Greenhalgh made. He submitted none to me and was not sitting with a pad and pencil, so, I don't know whether he made notes or not.

Q. Did you see any notes based on your conversations with Greenhalgh?

A. No, sir, I saw no notes based on my conversation with Greenhalgh.

Q. Don't you recall testifying in the Cleveland case that you did see notes which in your opinion were based on your conversations with Greenhalgh?

A. Yes, sir, but not notes of Greenhalgh.

Q. That was my question. That was my previous question. Perhaps you misunderstood it. You did see notes [fol. 825] based on your conversation with Greenhalgh?

A. Yes, sir, Mr. Canary had a half a page of questions that he raised.

Mr. Vincent: If your Honor please, we still have nothing to connect this with the Travis case in Denver, Colorado.

The Court: Let him go ahead, and we will get to that.

Q. Did you read those notes?

A. No, sir, they were on the table there, and he made the notes while he talked to me.

Q. Don't you recall testifying in the Cleveland trial that you did read those notes?

A. No, sir, I don't recall. I seen the notes.

Mr. Vincent: Objection, your Honor.

The Court: Well, I mean the way to ask him, if you have a specific question, not your synopsis of it. If he testified to that, why, of course, that would go to his credibility I expect. If you have anything there that would indicate that, in fairness to the witness you can ask him about it.

Mr. Deikman: All right, your Honor.

Q. So this appears on page 832 of the Cleveland transcript—

Mr. Kelley: Is this cross or direct?

Mr. Deikman: Cross.

Q. So, the half page—

Mr. Deikman: May I point out to your Honor that he just referred to this half page.

The Court: I assume that is what he is talking about now.

Q. "Question: You do not know whether or not it was the material you gave in Chicago? Answer: Oh, I don't know—I have talked about that a lot. It could be. It could be based

on things I talked about here too. Question: That is what I want to know, what you testified here today, was that the material? Answer: Yes. Question: On that page or half [fol. 826] page? Answer: Yes. Question: You did read it? Answer: Yes. I looked at it." Later on he says that he doesn't read very good but he remembers reading it.

The Court: I think you can go ahead with your questions here.

Q. Do you recall that testimony?
A. Yes, I do.
Q. And that testimony says that you did read it.

The Court: You need not repeat what it says. You can ask him if he gave that testimony.

Q. You did give that testimony?
A. Yes, that's right, but to me when I look at a thing, you can accuse me of reading it, but the point I am making now is I didn't go down, word for word, and read that half a page over. I sat there while they were asking me the questions, I knew what it contained in a general sort of way, and I certainly had every opportunity to look at it and to read it if I wanted to.

Mr. Deikman: Your Honor, just a moment. I will clear that up.

Mr. Kelley: May it please the Court, it appears obvious—

The Court: Just let him complete the testimony and argue the point afterwards. Continue, Mr. Deikman.

Q. Now, did that—did those notes that you looked at relate to your history in the Communist Party?
A. No, sir.

Mr. Kelley: I object to the form of the question.

The Court: I will sustain the objection.

Mr. Deikman: Well—

The Court: I do not know what you mean by that frankly, and I don't know how the witness could know. I don't understand what you mean "the history of the Communist Party". I don't know what that means.

[fol. 827] Mr. Kelley: It could cover his life from '33 to '55.

The Court: It could cover books he read and a hundred other things.

Mr. Deikman: I am using his language in the Cleveland trial.

Q. Do you recall giving this answer as to what it related to: "The subject matter here had to do particularly with my history in the Communist Party"?

A. I don't remember.

Mr. Deikman: That appears on page 836.

The Court: Let's go ahead and develop whether there is anything that comes within the statement category.

Q. Did the notes that you looked at relate to your joining the Communist Party?

A. The only thing I remember about the notes is that they related to the subject matter I testified to in Cleveland. They pertained to that, and they pertained to my activities around Cleveland.

Q. Did it relate—

A. And my history, if you want to put it that way, in the Communist Party around Cleveland.

Q. Did it relate to your joining the Communist Party?

A. I don't remember. I can only recall in a general way what I knew of the notes.

Q. Did those notes relate to your being expelled from the Communist Party?

The Court: Ask him if there was a statement, and then we can come back to this if it is relevant. Up to date apparently these notes were made by some lawyer in the case of preparation for the trial. I haven't held that those notes normally didn't come within the category of per se. If he did something that brought them under the statute, that is different, but I assume he could talk to a lawyer about anything and it would not be subject to production unless it comes within the statement of definition within the rule no matter what the subject matter.

Q. How did you happen to see those notes?

Mr. Vincent: I object to that.

[fol. 828] Mr. Deikman: For crying out loud—

The Court: Let him answer the question.

A. I seen notes. I seen the notes, because the United States Attorney there was questioning me regarding what my testimony would be in the Cleveland conspiracy trial, at least in part. Now, there were other questions at other times, but on that day the United States Attorney was questioning me relative to what my testimony would be.

Q. And he showed you those notes?

A. No, he didn't show them.

Q. Relative to what your testimony would be?

A. No, he didn't show them to me. He was making them there, and they were on the table there for me to see if I wanted to, and I picked them up.

Q. Did what you looked at reflect your—what you told him?

A. I think it did, but frankly, his writing is very poor, and I could not read half of those notes myself anyhow. They were very brief notes, and I suppose they were in a language that he could understand, but it would be hard for somebody else to understand.

Q. Well, didn't you testify that these were notes prepared as a result of your conversation with Greenhalgh in Chicago?

A. They were notes that were prepared for the Cleveland conspiracy trial, and Greenhalgh's discussions with me were on the same line, that's correct.

Q. They were prepared based on your conversation with Greenhalgh in Chicago you testified—

Mr. Vincent: I object.

The Court: I didn't know he did. I didn't hear him testify to that.

Mr. Vincent: Is that testimony here, Mr. Deikman?

Mr. Deikman: The problem is, I wanted to get into the fact he talked to him in Chicago and that he then saw these notes which were prepared on the basis of his testimony in Chicago, but—

The Court: To bring it up to date, it is perfectly simple to me they were simply the work notes of the lawyer made in

[fol. 829] the preparation of his examination of the witness. Unless there is something beyond that that brings them under 3500, why, that is what I am interested in, is where they come under 3500. I assume that practically any counsel that tries any case talks to a witness, and he may make notes of his own to guide him in his examination of the witness, and that sounds like what these are to me up to date. If there is something else you want to show about that, let's proceed to that.

Mr. Deikman: May it please the Court, the witness has just testified that Mr. Greenhalgh was preparing it, writing it in his handwriting right then and there.

The Court: When did he say that?

Mr. Deikman: Isn't that what you just said?

The Witness: No, definitely not.

Q. When were those notes—were those notes prepared in your presence?

A. Those notes were prepared on the basis of the questions that the United States Attorney was asking me at that time in preparation for my testimony at the trial.

Q. In other words, they were prepared in your presence?

A. Oh, yes.

Q. Right then and there?

A. Right then and there.

Q. In Cleveland?

A. Yes.

The Court: But they were the notes of the attorney in preparation for the interrogation.

Mr. Deikman: Your Honor, I would like to—

The Court: Put it this way: There wasn't any contemporaneous writing down of what the witness said, that is the point I am trying to make, according to all the testimony I have heard.

Mr. Deikman: I don't mean to be disrespectful, I think you are anticipating what I am getting at.

The Court: I am not.

Mr. Deikman: I am trying to show that he is now testifying that those notes were prepared in his presence in [fol. 830] Cleveland, and in the Cleveland trial he said that

they had already been prepared, that they were based on his statements to Greenhalgh made in Chicago.

The Court: Ask him about that. I do not know what he said in Cleveland.

Mr. Deikman: That is what I would like to go into now.

Q. Do you recall the following testimony on page 831 of the Cleveland transcript: "Question: Did you have any opportunity to see any of the notes that Mr. Greenhalgh had written out at your meeting in Chicago? Answer: No, sir. Question: Never saw any notes? Answer: No, sir. Question: And that is including to this date? Answer: Well, I don't know. I have looked at some notes with reference to this case, but it wasn't necessarily notes that was taken in Chicago, and they were very few and very brief. Question: The notes in Chicago? Answer: Yes. Question: The notes that you say you saw here in Cleveland, what day did you look at them? Answer: I, oh, I imagine about a week ago. Question: Do you recall how many pages of notes there were? Answer: About half a page. Question: About half a page? Answer: Yes. Question: Would that have been the subject matter—"

The Court: You have been over that already. You read that a while ago.

Mr. Deikman: One more question and answer.

The Court: All right.

Q. "Question: Would that have been the subject matter of which you testified in Chicago with him? Answer: It could be, yes, some of it." Do you recall giving that testimony?

A. Very definitely, and that is the same thing I said here.

The Court: I don't see any inconsistency with what he said here. That is what I would like to have you point out.

Mr. Deikman: This testimony—I may be misinterpreting it; your Honor can correct me if I am—says the notes were based on his discussion in Chicago.

[fol. 831] The Court: It doesn't say that to me at all.

The Witness: No, sir, that is not what I testified to.

The Court: I do not think that is what he said at all. Let's go on to something else.

Mr. Deikman: All right.

Q. Did those notes that you looked at in Cleveland relate to anything regarding your being expelled from the Communist Party?

A. All I can remember at the moment is that the notes had to do with some testimony at the Cleveland trial. Now, the notes were extremely brief, and most of them was impossible for me to decipher, they were in a language and in a way in which I suppose the attorney understood what they was, and I didn't—so, I don't know whether they contained it or not. My feeling is they did not, because they were very brief notes and had to do mainly with meetings that took place around Cleveland.

Q. You testified just now that the notes had to do with your testimony in the Cleveland trial. Therefore, I will ask you whether your testimony in the Cleveland trial ever mentioned Mine-Mill.

The Court: You need not answer that question. If necessary, the Court can look at the testimony, but I do not see its relevance. What we are interested in is his testimony here. Furthermore, I point out again, and I am not trying to hurry you or do anything, let's get to some point along the line where you bring this thing under 3500, whatever it was.

Mr. Deikman: I think we have, your Honor. We are prepared to develop that right now.

The Court: Go ahead with whatever you want to develop in an evidentiary way, and we will argue it out.

Mr. Deikman: I point to that in order to bring out this particular episode with Greenhalgh. Now, I will get back to what I was getting into before the recess.

Q. Previous to your testimony before the Grand Jury in January, 1957, in Cleveland—

[fol. 832] The Court: Let's stay with one—you are talking now about some statement that he made to this gentleman, and you are apparently asking for the production of it. Complete your testimony with respect to that one thing and let's get that out of the way.

Mr. Deikman: All right. I believe I have completed my testimony as to that one thing, and, if you would like, I will state our position on it.

The Court: Tell what you think you have developed that makes it proper to indicate that that is a statement under 3500 and should be produced.

Mr. Deikman: Under Section 3500 a statement is defined as, "A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government."

Now, in the first place, here is a transcription of his statement. He says that it was prepared in Cleveland in his presence, notes were made, it appears that these notes were in relation to his testimony which obviously had to do with a Taft-Hartley case in which his Communist Party experiences were material, they were taken contemporaneously with his statement according to his testimony, they were made to an agent of the Government. This agent of the Government happened to be a United States Attorney, but we contend that a United States Attorney is no less an agent of the Government by virtue of the fact that he is a United States Attorney. Mr. Kelley has said that under the rule of the Supreme Court case of Hickman vs. Taylor statements on the part of an attorney—

The Court: Let's not get into that. I am interested in what would bring it under the statement. The section you are relying on implies a literal transcription by some process, mechanical or otherwise, of what the witness says in his statement. Every word of his testimony is to the exact contrary of that, as I understand his testimony. Let's get to the testimony. He says that these notes that he saw were made by this lawyer to guide the lawyer in his interrogation of this witness and were in the language of the lawyer and didn't profess to be a verbatim statement of what this witness said. Now, the Section you are relying [fol. 833] on implies absolutely verbatim statement made contemporaneously by one of these processes of recording. Where is there any evidence that brings it under that section?

Mr. Deikman: The only exception I take to your statement is "absolutely verbatim". It says substantially verbatim. If I could see the Act for a minute.

Mr. Kelley: It says substantially.

Mr. Deikman: I feel what the witness has testified to is a transcription which is a substantially verbatim transcription to an agent of the Government and recorded contemporaneously with the making of such oral statement.

The Court: I do not think the evidence so establishes, and on that basis the request for the production relative to this particular transaction will be denied. Now, you can go to the next one.

Mr. Deikman: All right.

Q. Previous to your appearance before the Grand Jury in Cleveland in January of 1957 did you have occasion to talk to any attorney regarding your experiences in the Communist Party?

Mr. Kelley: Object to the form of the question.

Mr. Deikman: Yes, I can see the objection is well founded.

The Court: Let's see if he talked to any attorney first. I would assume that he talked to some attorney on the occasion of every appearance with respect to what he was going to testify to before the Grand Jury or the trial.

A. I have already testified that I talked to Mr. Greenhalgh.

Q. Is that the occasion on which you talked to Mr. Greenhalgh previous to your appearance before the Grand Jury in Cleveland?

A. Yes, that's right.

Q. Where was that?

A. In Chicago.

Q. Where in Chicago?

A. It was at my hotel. Right now the name slips my mind. If you can name off a few hotels in Chicago, maybe it will bring it back to mind if it is important.

[fol. 834] Q. How many days did you talk to him in Chicago?

A. A couple of days.

Q. Do you remember testifying in the Cleveland trial that you talked to him three or four days?

Mr. Vincent: I object to that.

A. It is entirely possible. I know it was more than a day.

Q. How many hours each day did you talk to him?

Mr. Kelley: That is irrelevant.

The Court: Let him answer. I do not see the relevancy.

A. I don't remember the hours. I probably talked a total of 12 hours.

Q. Do you remember testifying in the Cleveland trial that you talked to him about six or eight hours a day and it took up most of your time at the convention?

Mr. Vincent: That is argumentative.

The Court: It is entirely possible he did. If he talked to him 40 hours, what is the point if there wasn't any statement prepared or made to come within this statute? Ask him what was done about transcribing or making a statement or something like that whether it took a week or ten minutes. That is what I am interested in.

Mr. Deikman: He testified he talked to him three or four days six or eight hours a day. He said he assumes Greenhalgh took notes.

The Court: I haven't heard him tell that.

Mr. Deikman: In the Cleveland trial. That is what I am leading up to.

The Court: Ask him if there were any notes taken.

A. I think the Cleveland testimony will record that I knew of no notes being taken. I assume that anybody talking to me, and that includes you, will make some notes on it, but I had no knowledge of my own personal knowledge.

[fol. 835] The Court: There were no notes made in your presence?

The Witness: No, sir, there was no notes made in my presence.

Q. Do you recall testifying in the Cleveland case that you think he did take notes but you aren't sure?

The Court: I do not know what he testified to or whether that is your conclusion. Read the question to him and ask him if he so testified.

Q. On page 829 of the Cleveland transcript appears the following: "Question: And do you remember whether he had taken some notes at that time? Answer: I don't remember. I think he did, but I am not sure."

A. That's correct. I assume that any lawyer will take notes, but I don't know whether they do or not. Maybe that is one of the professional secrets. I don't remember any notes that Greenhalgh ever made. I can assume he made them.

Q. What was the subject matter of your conversation with Mr. Greenhalgh?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection unless you can show prima facie that there is something that comes within the category. It doesn't matter what the subject matter is.

Mr. Deikman: I think I will argue it now and not pursue the question any further. My argument is this, Your Honor: that prima facie it can be presumed that an attorney who talks to a witness for six or eight hours a day for three or four days has made notes.

The Court: Well, I do not think that is a sound assumption at all to start with. One of the best trial lawyers I ever knew in my life never made notes of a discussion with witnesses, and I have heard him lecture on the subject a good many times and say he thought that was the best way of proceeding. I don't know that there is any assumption to be drawn.

Mr. Deikman: On the basis of the witness's stated assumption, which is in the record—the record will bear me [fol. 836] out—that he assumes that he did take notes, that lends to my assumption, and we feel—

The Court: Let that assumption stand and assume that, where is there anything that would bring it under the rule? There is no showing here that they were ever transcribed or shown to the witness or that he ever saw them or ever accepted them or adopted them or anything else as the rule provides. Assume that he did make notes.

Mr. Deikman: Subsection (1) of Section (e) requires that the witness adopt the statement. Subsection (2) does not require that the witness adopt it.

The Court: Where is there any evidence that the attorney went back to his room that night, if that is your assumption, and wrote down notes that were a substantially

verbatim transcript of what the witness said? There is not a bit of evidence along that line.

Mr. Deikman: We contend that Mr. Greenhalgh is shown by the testimony that now exists to have taken notes as complete and substantially verbatim as, for example, Defendant's Exhibit I in it on page seven of the statements which we have been provided in regard to the witness Gardner under Section 3500. I won't press it, Your Honor. That is our position.

The Court: I do not see any merit to that for the reasons I have pointed out, so, the request for production in connection with that statement which you call a statement or this transaction preceding his appearance before the Grand Jury, no foundation has been laid to warrant any production, because it has not been shown that there is any statement made within the definition of the statute. So, the request will be denied. Do you have any others?

Mr. Deikman: Aside from the notes I would like to pursue the Greenhalgh situation in Chicago further, your Honor.

Q. Did Mr. Greenhalgh at any time as a result of his conversation with you in Chicago present anything in writing to you for your approval or for your inspection?

A. No, sir.

Q. Did you provide to Mr. Greenhalgh anything in writ-
[fol. 837] ing either printed or in longhand?

A. No, sir.

Q. Was your conversation with Mr. Greenhalgh in the form of question and answer or in the form of a narrative statement by you?

A. Both.

Q. I ask you to look at the reports or statements which have been provided to us in regard to your statements under Section 3500, and I ask you whether on the occasion of your testimony in the Cleveland trial, whether you saw any other statements by yourself in relation to your experiences in the Communist Party as to joining the Communist Party or being expelled from the Communist Party or in relation to Mine-Mill.

Mr. Kelley: Object to the question.

The Court: You need not answer that question I think for a number of reasons. The witness has testified here unequivocally, as I understand, that this statement that he referred to as dated July 16 was the only written statement he made in connection with this matter. You have asked him if he gave Mr. Greenhalgh any written statement made by himself, any writing made by himself or anything of that kind, and, so, I think the objection will be sustained if the Government objected.

Mr. Crandall: It did, your Honor. The objection was made.

Mr. Deikman: Well, your Honor, in the Cleveland trial statements were provided on the part of this witness to the defendants there which have not been given to us.

The Court: That is understandable, and I am not interested in that in the least, because, if the Court made a mistake here, it is not a matter to argue with this witness. The record is preserved on that. I think exactly that situation would attain. I can't think it would be otherwise, because, by the same token, matters that were relevant here were not given in the Cleveland trial. That is such a wide assumption I cannot see any merit to it whatever.

Mr. Deikman: That is why I asked him if it related to his experiences in the Communist Party, his membership.

The Court: He told you he furnished no paper or no statement to this man at any time regarding anything.

[fol. 838] Mr. Deikman: Statements were made, and they were provided in the Cleveland trial. I asked him if he saw those statements, and if he did—

The Court: I do not know if they were, and I do not know a thing about it. I am not trying the Cleveland case. So, we might as well drop that angle. Do you have any more questions you wish to ask him?

Q. Did you have—may I have that back, Mr. Gardner?
A. Yes.

Q. Did you have occasion late in 1956 to talk to Mr. Broome in Broome's hotel in Butte, Montana, relative to your activities in the Communist Party in 1951, 1952, 1953, and 1955?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection. You can ask him if he had a conversation with him and develop what happened in the way of making a statement, whatever the subject.

Q. Did you have occasion to talk to Mr. Broome, an attorney for the Government, in Broome's hotel in Butte, Montana, late in 1956?

A. I did.

Q. Was that one conversation or more than one conversation?

A. Only one that I can recall.

Q. How long did that last?

A. Oh, probably, a couple of hours.

Q. Did Mr. Broome take notes?

A. No, sir, he didn't, and I asked him if he was taking notes, and he told me he was not.

Q. Was anything in writing prepared as a result of your conversation at that time and shown to you?

A. There was never anything shown to me in writing about that conversation.

Q. And your blanket statement with regard to mechanical transcriptions applies to this instance and all other instances relating to that?

A. Yes, sir.

Q. Did you have occasion to speak with Mr. Broome in June of 1957 in Washington, D.C.?

A. I did. I am not sure of that time, but it was in the warm weather in 1957. I was in Washington and spoke to Broome.

Q. And at that time was it more than one conversation?

A. I believe there was more than one.

Q. How many conversations would you estimate?

[fol. 839] A. I would estimate two or three.

Q. How long were those conversations?

A. Oh, sometimes just about a half hour, sometimes an hour.

Q. Did they relate to your experiences in the Communist Party?

Mr. Kelley: The Government objects.

The Court: You do not have to answer that question.

Q. Did they relate to the Communist Party?

Mr. Vincent: Object to that.

The Court: The point I am trying to make and seemingly without much effect is that even if he talked about the precise matter he testified to here on the stand in this case, I do not know what the situation is. Unless there was a statement made within 3500, why, the thing would not be relevant. I assume that the witness can talk to a Government attorney about a case and about his testimony and that there is no basis for production unless this was a statement made within the definition of the statute. So, let's get to what was done in the way of a statement.

Mr. Deikman: Yes, sir, we understand that is the position of the Court. I think the following—

The Court: If there was a statement made, then we will come to the question of relevancy or something.

Mr. Deikman: But it is going to be our position, and we will have despite the fact that the witness will say no statement was made at that time in writing, we are showing an accumulation of numerous conversations lasting over many, many hours in which it is incredible to suppose that no statements were made or no notes were taken, and we will argue—we recognize what your Honor's position is on this already—but we want to make the record clear that that was the situation, because there will come a time when we will argue that this is a circumstance which shows that efforts should have been made on the part of the United States Attorney to find out whether there were such statements and to represent to us that in fact no such statements are in existence, and, since the United States Attor- [fol. 840] ney made no such effort, we feel that this would be error. That is why we are trying to make this record at this time.

The Court: Proceed and make the record. That is what I am waiting for, but there is no use of getting into the subject matter phase of it until you have established there is a statement. Then we can go to the subject matter.

Q. At that time did Mr. Broome take notes?

A. No, he did not.

Q. Did you provide him with anything in writing whether printed or in longhand?

A. I did not.

Q. Did he at any time show you anything in writing that you inspected which was prepared on the basis of your conversation with him?

A. He did not.

Q. Did the subject that you were discussing with Mr. Broome at that time encompass your membership in the Communist Party, your being expelled from the Communist Party or your joining the Communist Party?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection.

Q. Did you have occasion to in January, 1957, to talk to a Department of Justice attorney by the name of Harris?

A. Yes, I did.

Q. Was that on more than one occasion?

A. It probably was although I don't remember specifically that it was. He was the man who handled the examination before the grand jury, and I imagine it would be more than once. I just don't remember for sure.

Q. Can you estimate how many hours you talked to him?

A. Oh, when it comes to this I just have to guess. I would guess a couple of hours if guessing helps any. I don't remember.

Q. Did he take notes?

A. I don't know if he did or not.

Q. Was anything in writing based on your conversation with him shown to you?

A. No, sir.

Q. Did the subject matter of your conversation with him at that time encompass your membership in the Communist Party?

Mr. Vincent: The Government objects to that.

The Court: I will sustain the objection.

[fol. 841] Q. On the occasion of your testifying before the Grand Jury in New York City on or about December,

1956, or February, 1957, did you have occasion to talk to any attorney for the Government?

A. I did.

Q. What was—was there more than one attorney?

A. Yes, there was.

Q. How many were there?

A. Two.

Q. What were their names?

A. Mr. Greenhalgh and Mr. Harris.

Q. Where was that?

A. New York City.

Q. How many times did you talk to Mr. Greenhalgh on that occasion?

A. Oh, a couple of times. I don't remember specifically, once or twice.

Q. How many times did you talk to Mr. Harris on that occasion?

A. About the same number of times.

Q. Was that at the same time you talked to Greenhalgh?

A. Yes.

Q. Or separately.

A. No, at the same time.

Q. How long did your interviews at that time take with Mr. Greenhalgh?

A. Oh, probably, well, they were both together, so, I spent a couple of hours probably each time.

Q. Did they take notes?

A. Not to my knowledge. I don't know if they did.

Q. Did they prepare anything in writing for you to inspect?

A. They didn't show me anything.

Q. Was any stenographer present?

A. No, sir.

Q. Did the subject of conversation encompass your experiences in the Communist Party?

Mr. Vincent: We object to that, your Honor.

The Court: Sustain the objection.

Q. I believe you testified that you spoke to an attorney for the Government about a week before you testified in this case. Could you tell me who that attorney was?

A. Yes, Mr. Kelley.

Q. Where was that conversation?

A. In Mr. Kelley's office.

Q. Did you talk to any attorney over the telephone regarding this case?

A. Not that I recall. I think somebody asked me to come here to testify over the phone.

Q. Who was that?

A. I don't remember who that was.

Mr. Vincent: That is irrelevant, if the Court please.

[fol. 842] Mr. Deikman: I have a question to follow that.

The Court: That was in the record yesterday, but then—

A. I don't remember right now what his name was.

Q. How long did that conversation last?

A. About a minute.

Q. Did you talk to Mr. Kelley in his office on more than one occasion?

A. Yes, I have talked to him almost every day.

Q. For how many days?

A. For 10 days. We didn't always talk about the case, but I—

Q. Particularly in regard to the subject matter of which you testified in this case how many days did you talk to Mr. Kelley?

A. I can only remember one time when we went into this case.

Q. How long did that conversation last?

A. Oh, I guess 45 minutes, an hour.

Q. Did Mr. Kelley take notes?

A. I don't know. He could have been writing to his wife.

Mr. Kelley: Well, so the record will be clear I took notes.

Q. Did you see Mr. Kelley writing?

A. Yes, I seen him write.

Q. Was he writing during the course of talking to you about this case?

A. I think he was. I don't remember specifically, but I would guess that he was.

Mr. Kelley: If you would see how my desk is piled with stuff, you would understand that answer better.

The Court: Let him proceed with his examination.

A. I just want to make clear that people will be making notes on something else. I don't know when they are making notes unless they show them to me.

Q. Did Mr. Kelley show you his notes?

A. No, he didn't.

Q. Did Mr. Kelley provide you with anything in writing for your inspection as a result of your interview with him?

A. The only thing that was provided me was the Cleveland testimony.

Q. That was the only thing in writing?

A. Yes, sir.

[fol. 843] Q. Did you give Mr. Kelley anything in writing?

A. Well, I returned that testimony to him.

Q. That is the only thing you gave him?

A. Yes, sir.

Q. Did you—were you interviewed by Mr. Vincent?

A. No, sir.

Q. Were you interviewed by Mr. Crandall?

A. No, sir.

Q. Was any stenographer present at the time you were interviewed by Mr. Kelley?

A. No, sir.

Q. At the time that you talked to Mr. Kelley about it on other occasions during the 10 days that you say you have talked to him did you or did you not mention the subject concerning which you testified in this case?

Mr. Kelley: Mr. Deikman, it has been a week since he has been off the witness stand. You mean before he testified?

Mr. Deikman: He said he talked to you on ten occasions but only on one occasion did he talk to you about the subject matter of this case as far as he recollects. Now, I perhaps am going over the same territory, but it is so astounding that I would think it is an answer which surprises me, and I think I can go into it further.

Mr. Kelley: I should think you would separate before he testified and afterwards, because whether we talked after his testimony would not be particularly relevant to what you are getting at.

Q. Other than on occasions after you testified in this case and on the other occasions besides the one in which you say Mr. Kelley interviewed you for 45 minutes did you talk to Mr. Kelley at any other time about your subject that you testified to in this case?

A. Oh, yes.

Q. Did Mr. Kelley at any time during those other conversations take notes?

A. No, sir.

Q. Did he ever show you anything in writing on those other occasions?

A. No, sir.

Q. Was any stenographer present on those other occasions?

A. No, sir.

Q. Now, after the completion of your testimony thus far did you have any conversations with Mr. Kelley concerning the subject of your testimony?

A. Oh, I think that we probably talked about it. I don't remember anything specifically, but there was no conference as you might call it. Going out to lunch or something [fol. 844] we might have, I might have commented on something, and he might have commented. I don't recall anything specific.

Q. Did he take notes?

A. No, sir.

Q. Was a stenographer present?

A. No, sir.

Q. Did any other person take notes?

A. No, sir.

Mr. Deikman: That completes our examination.

The Court: All right. Now, is there any further examination on anything? I would like to get the evidentiary phase of this thing all settled. That is what we talked about when Mr. Witt was in here. You can conclude your argument. But let's get the evidentiary phase of it all settled.

Mr. Deikman: Let me confer with Mr. Witt for a moment.

The Court: All right. What the question was, I thought our understanding was that we would complete all evidentiary matters with this witness and any argument about the matter we could have after we get through with the courtroom.

Mr. Witt: That is my understanding, and specifically I thought we agreed that we would come back and make our motion on the grand jury testimony.

The Court: All right. Then you have no more interrogation now.

Mr. Deikman: Yes.

The Court: The Government just handed me a series of statements. I haven't examined them yet. They were referred to in the witness's testimony here made at Anchorage, Alaska. The first one here is October 4. I don't know the dates of the others. I will look these over with the idea of determining whether they are in any way relevant to the direct testimony in this case, and, if you gentlemen will give me five minutes, or I will send for you. I don't know how long it will take.

After Recess

The Court: As the record indicates, just before recess in Chambers the Government handed me a number of statements all of which bear the heading of Anchorage, Alaska, [fol. 845] dated either October 3 or October 4, I think that's correct. I think there are no other dates in here. All of them contain a signature designated as Fred Gardner.

The witness Gardner testified here in Chambers that in the fall of 1957, I am not sure about the precise date, he made several statements to an agent of the Federal Bureau of Investigation at that time, and, as I understand the Government, these are the statements that the witness referred to in his testimony you understand?

Mr. Kelley: That is my understanding, your Honor.

The Court: I have examined these statements, and there is nothing in any of them that pertains to any matter that

relates in any way whatsoever to the subject of the witness's testimony in this case on trial. Therefore, the order for production made on motion of the defendants will be denied. These statements I think should be sealed and transmitted to the Court of Appeals in the regular manner, if there is an appeal in this case.

Mr. Kelley: Of course, along with our request that all of these originals be photostated and substituted we would like—

The Court: I haven't given thought to that, and I want to give that consideration, whether the originals ought to go or whether the photostats ought to go, but anyway these ought to go to the Court of Appeals if the case ever goes to the Court of Appeals.

Mr. Kelley: All right, your Honor.

MOTION THAT ALL NOTES, MEMORANDA, ETC., TESTIFIED TO BY WITNESS GARDNER DURING INTERVIEWS WITH GOVERNMENT ATTORNEYS BE PRODUCED AND MOTION FOR PRODUCTION OF STATEMENTS RE WITNESS GARDNER AND DENIAL THEREOF

Mr. Deikman: I do not believe the record is clear on this, your Honor, so, I had better state our motion again: In regard to all memoranda and notes by United States Attorneys, so, I will state that motion: The defendant moves that all notes, memoranda or other writings testified to by the witness Gardner as having been made during the course of his interviews with attorneys for the Government including but not limited to Mr. Kelley's notes and memoranda, that these notes and memoranda be produced to the defendant under Section 3500, and, further, we move that in view of the witness's repeated testimony that he was interviewed for long periods of time of many, many [fol. 846] hours by attorneys for the Government, in view of that fact, we request an order on the part of the Court directing the United States Attorney to determine whether as a result of such interviews any notes or memoranda or statements under Section 3500 were prepared by attorneys for the Government during those times. Those are our two motions.

Mr. Kelley: The Government objects to furnishing anything encompassed by the motion, first, because there has been no foundation laid for the production to show their existence of anything that would be encompassed within 3500, and as to the notes which were taken by the United States Attorneys or Government attorneys we submit that those would come within the classification of work product, and for that reason in addition to the other reasons stated would not make them producible.

Mr. Deikman: I would like to make one statement with regard to that, and that is that I would like to get it across for the record at this point that it is our understanding that the rule of Hickman vs. Taylor is that work product may under certain circumstances be produced to the opposite party.

Mr. Kelley: I might say also for the record that we have produced one affidavit I think it was as to the witness Mason which was obtained by a Government counsel in the preparation of the proceedings before the NLRB, and because it was a notarized statement signed by the witness that is produced.

The Court: Well, I don't think the question raised by Hickman vs. Taylor, if it is relevant under this rule, it of necessity needs to be reached here, because, as I view the evidence, as I have expressed in the course of the taking of this testimony with respect to specific transactions, I think there is no evidence whatsoever to establish in any of these occasions that are covered by the testimony that there ever has been a statement made within the definition of 3500 (e) that would be producible under this section regardless of whether it was made to an attorney or an FBI agent or anything.

In other words, there is simply no showing here that at any time anything in the way of a statement as provided in 3500 was given by this witness to any Government agent on the occasions that have been covered here by the testimony that has been covered other than as already has been [fol. 847] produced by the Government, and for that reason the motions will be denied.

I do not believe, I might add, Mr. Deikman has stressed it continually, that any inference within, any statement

within the definition of 3500, any statement was made and prepared with any of the essential details that go with a statement that there could be inferred from the fact there was a lengthy conference between counsel and the witness.

MOTION THAT ALL NOTES AND MEMORANDA MADE BY ANY UNITED STATES ATTORNEY BE PRODUCED AND DENIAL THEREOF

Mr. Deikman: I would like to make in view of the Court's ruling, I would like to make another motion. The defendant moves that in the event that we are incorrect that notes and memoranda do not fall within the definition of statement under Section 3500 that under the holding and philosophy of the Jencks case taken together with the holding and philosophy of the case of Hickman vs. Taylor apart from the statute, Section 3500 we move the production of all notes and memoranda made by any United States Attorney including but not limited to notes and memoranda made by Mr. Kelley.

Mr. Kelley: We have the same objection.

The Court: I think there is nothing in those cases that I recall that would justify the production of memoranda made by counsel even to the limited extent shown here by the testimony. I know of nothing in the pronouncements in those cases that would support that view. In fact, I think the cases are to the contrary. So, that motion will be denied. Is there anything further? You are reserving the right to this grand jury business.

Mr. Witt: We will come back after open court. May I say this before we go in open court in view of Mr. Deikman's interrogation in chambers about his talks with Mr. Kelley, since he quotes here from Cleveland I intend to drop that subject and not go into that in open court, so that I am making the statement in view of our earlier discussion today in the course of which your Honor said I could go into it, but now it has become unnecessary. So, all I have is to finish off, so you will know, I think it will be helpful, to finish off the Port Colburne-Buffalo incident, a few more questions, and a few questions about his discharge from Mine-Mill which your Honor passed on this morning and said we might go into.

[fol. 848] The Court: I said you might ask him if he discussed anything since he has been in Denver. What was this about Mine-Mill?

Mr. Witt: We discussed this morning my further questioning him about his discharge by Mine-Mill and when that took place with reference to his expulsion from the Communist Party by the FBI.

In Open Court

The Court: Ladies and gentlemen of the Jury, last night when we recessed I thought as I indicated to you that we could complete this conference in Chambers so as to enable us to proceed with the trial here in the courtroom at 1:30 and asked you to return at 1:30. It has developed, as a matter of fact, that notwithstanding our beginning this morning at 9:15 and working with a short noon hour counsel and the Court have not been able even at this moment to complete the matters involved in the discussions in Chambers. We thought rather than to detain you here longer this afternoon to proceed with the completion of the cross examination of Mr. Gardner and any redirect that may be in order after which I am going to excuse you until tomorrow morning and resume with these conferences. So, at this time we will proceed with the cross examination, the further cross examination of Mr. Gardner by the defense.

Before we do that I wish to mention one other thing to you. You will recall that yesterday the Court permitted this witness to answer the question with respect to whether the Hod Carriers Union and the Mine-Mill Union were rivals in 1955 or about that time. The Court permitted the witness to answer that question. I have concluded after a consideration of the matter and after hearing the arguments of counsel that the Court was mistaken in permitting that question to be answered. So, you will disregard entirely any of the testimony of this witness relating to the question of any rivalry between the Hod Carriers and Laborers Union and the Mine-Mill Union. You will not consider that at all in your deliberations of the case, and that testimony will be stricken.

So, you may proceed, Mr. Witt, with your cross examination.

[fol. 849] FRED GARDNER, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Q. Mr. Gardner, in connection with your testimony about returning from Canada to Buffalo with Travis will you tell us what you did after you crossed the bridge to New York State?

A. I believe we went to a hotel in Buffalo.

Q. Do you recall the name of the hotel?

A. No, I don't right offhand. It occurs to me it was in the vicinity of the Ford Hotel there, but I can't recall the name of it.

Q. Would it have been the Touraine Hotel that you went to?

A. That sounds like it would be it.

Q. You checked in that hotel that night?

A. I think that is what happened.

Q. Did you stay at that hotel that night?

A. I don't recall for sure whether I did or not.

Q. Well, I thought you said a moment ago you checked into that hotel.

A. We came back to that hotel.

Q. You had dinner there, didn't you?

A. I believe so.

Q. You had dinner with Travis?

A. I don't recall for sure that I did or not. It seems that I did.

Q. Do you recall anybody else that you might have had dinner with?

A. I don't offhand.

Q. About what time was it that you crossed the border into New York State?

A. Well, it was after dark.

Q. It was the fall of the year, wasn't it?

A. Yes.

Q. And it was pretty late in the evening, wasn't it?

A. Yes.

Q. About 8:00 o'clock?

A. I imagine at least that, maybe later.

Q. Was it as late as 9:00 o'clock?

A. I don't remember for sure, but I am sure it was at least 8:00.

Q. But you do recall at least you had dinner at the Touraine?

A. I don't recall exactly where I had dinner, but I certainly don't recall having it any other place.

Q. I will ask you again whether you recall checking in at the Touraine and signing the register at the Touraine that night.

A. No, I don't recall it, but I could have.

Q. Do you recall whether you drove back to Cleveland that night from Buffalo?

A. It doesn't occur to me that I did.

Q. You drove back to Cleveland the next day, didn't you? [fol. 850] A. I think so.

Q. Aside from Travis did you see anybody else connected with Mine-Mill that night?

A. I don't remember.

Q. To refresh your recollection didn't you see John Clark, the President of Mine-Mill, that night?

A. I don't remember for sure whether he was there or not.

Q. I will ask you whether you remember that Travis checked into the Touraine at the same time you did.

A. It occurs to me that he did.

Q. And he signed the register?

A. I suppose he did.

Q. Then I will ask you whether—strike that, please, Miss Marson. Did Travis and you sign the register at the Touraine at the same time?

A. I am not too sure. I just don't remember for sure what happened when we came back.

Q. Do you recall whether a third person also signed the register?

A. No, sir, I don't.

Q. Do you recall whether Jack Clark also signed the register?

A. It occurs to me that I remember seeing Jack Clark, and I can't fix him definitely at the hotel right now.

Q. But you recall seeing him that night?

A. It seems to me I did.

Q. Did you find out either that night or any other time how Jack Clark got back from Canada?

A. Yes, I believe that one of the fellows drove him back.

Q. Do you remember which one it was?

A. One of the staff members.

Q. One of the Canadian staff members?

A. Yes.

Q. Which one?

A. Oh, I don't remember. I didn't know ther names very well.

Q. Was it the Business Agent of Port Colburne Local?

A. It could have been.

Q. Well, just—

A. I don't know. I don't know who drove him back.

Q. Just to refresh your recollection, Mr. Gardner, did Clark drive with you back from Welland to Port Colburne?

A. No, sir.

Q. Who drove him back?

A. Oh, I don't know who drove him back.

Q. Where did he go from Welland—strike that, please. Where did Jack Clark go from Welland, if you know?

A. I don't know. I wasn't paying much attention to Jack Clark at the time.

Q. And you don't know what his plans were after you and Travis left from Canada when he stayed in Canada?

[fol. 851] A. I think he came back. I think he mentioned something about going to Washington or something the following day.

Q. Or going to New York, wasn't it?

A. Or to New York or Washington or some place.

Q. Are you able to fix the dates now?

A. No, sir.

Q. Now that you have slept on it?

A. No, sir.

(Document marked Defendant's Exhibit M for identification.)

Q. How many miles from Cleveland to Buffalo, Mr. Gardner?

Mr. Crandall: We object to that.

Mr. Kelley: We object to that as being irrelevant and immaterial.

The Court: I didn't hear the question.

Mr. Witt: The question is how many miles is it from Cleveland to Buffalo. This is preliminary.

The Court: I think I will let him answer on counsel's statement it is preliminary.

A. Oh, I don't know. I would say roughly 90 miles.

Q. Do you recall in connection with this trip to Canada that you drove from Cleveland to Buffalo on one day, the following day is the day that you crossed the border and went to Port Colburne and Welland and came back that night and it was the day after that that you went back to Cleveland, do you recall that?

A. I am not too sure of that and how it worked out.

Q. All right, Mr. Gardner, I will show you Defendant's Exhibit M for identification and ask you whether that is not your voucher which you submitted to Mine-Mill for the period ending October 15, 1951.

A. It could be.

Q. Well now, Mr. Gardner, is that your signature at the bottom?

A. Yes, but this doesn't, this doesn't say what trip it was.

Q. I haven't asked you that. Mr. Gardner, you just wait. You just answer the question I am asking you. I am simply asking you whether that is not your voucher.

[fol. 852] A. Well, I think it is.

Q. You know it is, don't you, with your signature?

A. It appears to be my signature, yes.

Q. Now, I direct your attention to the date of October 8, and does that state that on October 8, 1951, you went from Cleveland to Buffalo?

A. Yes.

Q. And that shows your mileage, doesn't it?

A. Yes, and—

Q. It shows that the mileage, the speedometer reading on your car when you left Cleveland was 61,130, doesn't it?

A. Yes.

Q. And your speedometer reading at the end of the trip was 61,337, doesn't it?

A. Yes.

Q. Now, in view of that, Mr. Gardner, do you want to take a minute to calculate the difference and then I will ask you whether you won't tell us again what your present recollection is as to the mileage between Cleveland and Buffalo.

Mr. Kelley: May it please the Court, that is irrelevant and collateral to any issue in the case.

Mr. Witt: No, sir, it goes to the heart of this man's testimony, and it is preliminary, your Honor. I have to ask him—

The Court: I will overrule the objection on the basis it is preliminary, but if you can compute from that what the mileage is, you can state.

A. Just roughly, I'm not too good at figures just like this to subtract, but I was wrong, because roughly the mileage is about 180 miles from the city limits to city limits.

Mr. Witt: At this point I offer this document in evidence.

The Court: For what purpose?

Mr. Witt: For the purpose of asking him further questions from it and reading from it further.

The Court: I don't think there is any basis for the introduction of it now.

Mr. Witt: All right, sir, I will ask him some more questions.

[fol. 853] The Court: All right.

Q. Now, this voucher shows for the date of October 9, the next day, that you used your car in the Buffalo area, doesn't it?

A. Yes, sir.

Q. And it shows the speedometer readings there at the beginning of that day and the end of that day, doesn't it?

A. Yes.

Q. And that is the day, isn't it, that you went to Canada?

A. Yes.

Q. And that mileage which you referred to as having been done in the Buffalo area is the mileage involved in the trip from Buffalo to Canada and back?

A. I will tell you what would happen. When I left Cleveland I would take the speedometer reading, and I would not take it until I came back and roughly fill in between. I would not necessarily take that mileage from Buffalo to Canada. I would fill it in when I came back to Cleveland to get the total mileage for that trip.

Q. In any event I will ask you whether that entry would indicate to you that it was on that date, October 9, that you went to Canada and back to Buffalo.

A. Yes, but my miles would have to indicate, my mileage from Cleveland and to the time I returned to Cleveland to get the total mileage, because I never attempted to be accurate on any shorter trips that I made. I filled them in roughly, and that was it as long as I got the actual mileage when I started and when I returned to my home base.

Q. I wasn't asking you about the mileage. I was asking you whether this voucher with the entries of that day would indicate that was the date you went to Canada.

A. Yes, it would indicate that.

Q. Now, I direct your attention to the entry for the next day, October 10, with the description under the heading transportation Buffalo to Cleveland with the speedometer readings at the beginning and at the end and ask you whether that would indicate to you that that is the date on which you returned to Cleveland from Buffalo.

A. Yes, sir, but, again, I want to point out—

Q. I am not asking you about the mileage again, Mr. Gardner.

A. Yes, sir.

Q. I am simply asking you whether that would indicate to you that that is the date on which you drove back to Cleveland from Buffalo.

A. Yes, that's right.

Q. Then I will ask you whether it was on the evening of [fol. 854] October 9 that you registered at the Touraine Hotel.

A. It could be. I don't remember the date I registered there.

Q. Well, I am asking you to tell us whether your voucher indicates in light of the answers that you gave that when you came back into New York State from Canada you registered at the Touraine, whether that would not be October 9.

A. Well, it could be. According to this it would indicate that. I, again, would have to say that in lieu of any specific bills or anything I don't know any more than what the voucher says.

Q. Now, Mr. Gardner, did the Canadian Immigration authorities ask you any questions before they passed you that day?

A. Yes, they did.

Q. Did they ask you about a brief case or brief cases you had in the car?

A. Well, I don't recall that. The only conversation I recall we told them we were going to Port Colburne for a couple of bottles of beer, and I remember—

Q. Now, Mr. Gardner, I am sorry to interrupt you. I wasn't asking you about October 8 or whenever it was when you went up. I was asking you about the day on which—I wasn't asking you about your entry into Canada. I am asking you about your return from Canada to Buffalo.

A. I—

Q. To make it clear so there won't be any confusion in your mind and in the record, Mr. Gardner, did the Canadian authorities at the border ask you any questions before they permitted you to return to the States?

A. Not that I recall. I don't remember any questions. I remember only driving up to the shanty there and getting an okay to go ahead.

Q. Don't you recall their asking you questions about the brief case you had in the front seat with you?

A. No, sir, I don't recall any questions at all.

Q. Did the American authorities ask you any questions about the brief case?

A. I don't recall any.

Q. Do you recall having a brief case in the seat of the, in the front seat of the car?

A. No.

Q. Your vintage Chevrolet was an old-fashioned coupe, was it?

A. Yes, with a rumble seat.

Q. With a rumble seat?

A. Yes.

Q. It didn't have a seat in the back in the body of the car like the modern cars?

A. That's right.

Q. You were very crowded?

A. We were going up.

Q. I am talking about on the way back from Canada, there wasn't much room in that seat where you were sitting? [fol. 855] A. Well, I imagine we were both comfortable. I don't recall any crowded condition coming back.

Q. Do you recall a crowded condition going up?

A. Yes. Yes, I do.

Q. Who was with you on the way up?

A. Jack Clark and Travis.

Q. Clark with (sic) with you on the way up?

A. That's right.

Q. And you don't remember—and you remember the crowded condition on the way up, is that right, with the three of you?

A. Yes.

Q. And did Jack Clark complain about that and kid you and Travis about it?

A. Yes, he sure did.

Q. And isn't it true that Jack Clark was in that car with you also on the way back and made the same complaints and kidded you and Travis about being so big and he didn't have enough room for himself, do you remember that?

A. No, sir, he was not with us coming back.

Q. You would not remember—strike that, please. Do you remember Jack Clark complaining about the fact that the brief case that was on the front seat or on the seat with the three of you made it very uncomfortable for him?

A. No, sir, I don't remember. I just don't remember a brief case being in the front coming back.

Q. I will ask you now, isn't it true that after you crossed the border, I will ask you again, you went directly to the Touraine Hotel, didn't you?

A. Yes.

Q. And you and Travis and Jack Clark had dinner there, didn't you?

A. I remember we had dinner. I don't remember Jack Clark specifically. I remember seeing Jack Clark at the hotel, but it is my recollection that he went there in a cab.

Q. A cab?

A. Yes.

Q. From the bridge?

A. I think so.

Q. And is it now your recollection that Jack Clark stayed at the hotel that night?

A. I am not sure of that. I remember vaguely of seeing Jack Clark around the hotel and of some conversation about his leaving the next day for I thought Washington, but it could have been New York, Philadelphia or some place else.

Q. Mr. Gardner, before you were discharged by Mine-Mill you had been removed from the staff in Butte, hadn't you?

A. Well, not that I know of.

Q. Well, Mr. Gardner, before you were discharged weren't you sent on an assignment out of Butte?

A. Well, I was sent on a very brief assignment out of Butte, yes.

[fol. 856] Q. When was that?

A. I believe it was in May or June.

Q. And what was that assignment?

A. Oh, to make some kind of a survey in the uranium industry.

Q. And you made that survey and went back to Butte?

A. Yes.

Q. Before you were sent on that survey did Al Pezzati, the Secretary-Treasurer of Mine-Mill, have a discussion with you about your status in Butte?

A. Not that I recall any conversation with Al Pezzati.

Q. Who fired you?

A. Al Pezzati.

Q. And who was present on the occasion you were fired?

A. I believe the Board member from the District.

Q. Ernie Salvas?

A. Yes. I was first called by Pezzati, he talked to me on the phone and asked me to come up to the office so he could fire me officially in the office.

Q. What was the date of that, do you remember?

A. I don't remember the exact date of it.

Q. Was Jack Clark also there?

A. I believe he was although I would not be sure of that. It occurs to me there was somebody else in the room.

Q. Isn't it true that before you were fired on that particular date whatever it was that Al Pezzati had talked to you about your work in Butte on an earlier occasion?

A. Not that I recall any discussion with him on it.

Q. Mr. Gardner, when you were on the staff in Butte what address did you put on your vouchers?

A. Whatever my address was. I don't remember specifically at which time. I lived at a couple places in Butte.

Q. I will direct your attention now to the year 1955 when you were fired.

Mr. Vincent: If your Honor please, we see no relevancy to this line of questions.

Mr. Witt: This is preliminary.

The Court: Proceed. I will overrule the objection.

Q. Isn't it true that on the vouchers you submitted in 1955 beginning with January you were in the habit of putting the Mine-Mill office address under your signature?

Mr. Kelley: May it please the Court—

[fol. 857] A. I don't know.

Mr. Kelley: —I don't see how it is relevant what might be on the vouchers. We didn't go into the vouchers on the direct examination.

Mr. Witt: That doesn't matter. I am not restricted to what—

The Court: What is the purpose?

Mr. Witt: May we approach the Bench, or I can say it in open Court, but I think Mr. Kelley would object?

(Conference at the Bench.)

In Open Court

Q. Mr. Gardner, didn't there come a time in 1955 before you were fired that instead of putting down the office address, the Mine-Mill office address on your vouchers as you had been doing you changed and filled in your home address under your signature?

Mr. Kelley: I object to that.

The Court: I will sustain the objection to that question. If counsel will come to the Bench.

(Conference at the Bench.)

In Open Court

(Document marked Defendant's Exhibit N for identification.)

Q. Mr. Gardner, I show you Defendant's Exhibit N for identification, and I will ask you to look at those and tell us whether it is not true that from January through your voucher for March 31, 1955, you used the Mine-Mill office address and beginning with your next voucher, April 15, 1955, you used your home address?

A. That's right.

Q. And do you recall now that you used your home address on all your remaining vouchers until you left Mine-Mill?

A. Yes.

[fol. 858] Mr. Witt: Mr. Kelley suggests that since I don't plan to offer these in evidence—

The Court: I don't see any purpose up to date to offer them in evidence.

Mr. Witt: No, no, your Honor. Bear with me a minute. I want to tell your Honor and the Jury what Mr. Kelley suggests. I am not offering them in evidence. Therefore, Mr. Kelley suggests that I read into the record the office address and the home address on his vouchers. Do I understand you, Mr. Kelley?

Mr. Kelley: I am suggesting, the implication was that he was giving the office as his address. It says on the voucher send check to a certain address. It is so there is no confusion about it.

Mr. Witt: Let the record show that before this voucher for April 15, 1955, on the line which says "Send Check To" the witness filled in 517 Metals Bank Building, Butte, Montana, and beginning with the voucher for April 15 he filled in on that line address 409 West Park, Butte, Montana.

Mr. Kelley: It says send to.

Mr. Witt: On the same line "Send To". I said the same line.

Q. In April through June you lived in Butte at 409 West Park, is that correct?

A. That's right.

Q. Now, Mr. Gardner, I show you this voucher of yours for June 30, 1955, and I ask you to look at that and tell us whether that is not the last voucher you submitted as an employee for Mine-Mill.

A. I don't know if it is the last one. That is about the time that I was fired.

(Document marked Defendant's Exhibit O for identification.)

Mr. Witt: This is Defendant's Exhibit O for identification, the one I was just asking the witness about.

Q. And that bears your home address on the line we have just been talking about?

A. Yes.

[fol. 859] Q. You took a vacation, didn't you, in April, 1955?

Mr. Vincent: If your Honor please, this whole line of questioning of Mr. Witt—

Mr. Witt: That is the last one I am asking regarding Pezzati.

Mr. Vincent: We still don't know preliminary to what.

The Court: I think I will overrule the objection. He says they are preliminary questions.

A. I don't remember when I took the vacation.

Q. All right, Mr. Gardner, will you now tell us if you recall why it is that in April on the line on the voucher

saying "Send Check To" you filled in your home address instead of office address as you had theretofore in '55?

A. Yes, sir. I think about that time was the discussion about my taking off for the Four Corners area to make a survey in the uranium industry, and I wanted the checks to go directly to my wife, and I continued that. It was just prior to that that I had had a discussion with the Secretary of the Communist Party who told me he was very unhappy with my work in the union there in Erie and that it might be advisable for me to look for another job.

Q. Mr. Gardner, in that little speech you made you said Erie. Is your mind back to the days when you are anxious to tell the jury you were taking orders—

A. I—

Q. Just a minute, Mr. Gardner. —when you were taking orders from the Communist Party to appear before a Senate Committee and perjure yourself?

Mr. Kelley: That is highly improper.

The Court: The jury will disregard the statements of counsel, and it will be stricken from the record.

Mr. Witt: I move that the statement of the witness about the Communist Party be stricken and that the jury also be instructed to disregard that.

The Court: The motion will be denied, and the answer will stand, because it was responsive to the question.

[fol. 860] Q. All right, now, Mr. Gardner, when did you return from your survey?

A. Why, I don't remember exactly when it was. I remember it was made during, oh, I think the early part of the year there before I was fired I know.

Q. Were you in Butte during the month of June?

A. I don't remember for sure. I think I was. I don't remember. You see I made two surveys. I went first to—

Q. Just a minute, Mr. Gardner. I haven't asked you a question. You said you didn't remember. You answer my question. Now, I show you Defendant's Exhibit O for identification, your voucher for the period ending June 30 and ask you whether that doesn't indicate that you were in Butte

from June 16 to the end of that month when you submitted that voucher.

A. Yes, sir.

Q. Now, was the Board member, Ernest Salvas, a member of the Communist Party to your knowledge in 1955?

Mr. Kelley: May it please the Court, we object to this. It has been gone into once before.

Mr. Witt: It is preliminary to finishing out this line as background leading to his being fired by Mine-Mill.

The Court: Has he been mentioned?

Mr. Witt: He has mentioned him as the Board member in Butte, the Board member for District 1.

Mr. Kelley: On cross examination his name was mentioned but nothing on direct.

The Court: I think I will overrule the objection and let him answer the question. He may answer.

A. I don't know. I assume he was. He met with the Communist Party Secretary, but he never told me he was.

Q. Did you attend Communist Party meetings?

A. No, sir, I never attended any meetings with him present.

Q. With Salvas?

A. That's right.

Q. Did you ever see him pay dues to the Communist Party?

A. No, sir.

Q. Now, there was a strike in Montana in 1954, wasn't there?

Mr. Kelley: May it please the Court, it seems to me this is collateral.

[fol. 861] Mr. Witt: It is on the same question of his discharge.

Mr. Kelley: We could go on for hours on preliminary matters.

The Court: What do you say this relates to?

Mr. Witt: This relates to his being fired. I want to show that his troubles with Salvas and other Mine-Mill people in Montana began in 1954 and culminated in his being fired. The witness has been—

The Court: What relevancy does this have to this case?

Mr. Witt: The witness is answering—is anxious to relate this to his being told by an FBI agent that he was expelled from the Communist Party, and I want to show in view of the FBI statement that we have that this man told the FBI that Morelas told him in June, 1955, that he was expelled by the Communist Party, and in that statement this man says that he was thereafter fired by Mine-Mill leaving the inference that he was fired by Mine-Mill because he was expelled from the Communist Party. I want to show that before June, 1955, this man was already working to break up Mine-Mill refusing to carry out orders of his immediate superior, Board member Ernest Salvas and refusing to work with the other organizers of Mine-Mill in Butte.

Mr. Kelley: The Government still objects. It is trying a collateral matter, your Honor.

The Court: Well, I think I will let him pursue the question. I don't see the subject—I don't see the relevancy of this particular question though, but go ahead.

Mr. Vincent: I would like to interrupt a moment, please.

Mr. Witt stated just now that the record would show that this witness testified that he was notified of his expulsion from the Communist Party by an FBI Agent. Your Honor, we submit the record will not bear out that statement of Mr. Witt.

The Court: The jury will be the judge of what the record contains, and their recollection will be the one that controls. Counsel's statements are not evidence and should not be considered as evidence.

[fol. 862] Mr. Witt: Do you remember the question, Mr. Gardner?

The Witness: No, I don't.

Q. The question is whether there was a strike by the Mine-Mill members in Montana in 1954.

A. There was.

Q. And that strike was finally settled, wasn't it?

A. A contract was signed. I hope that settled it. I don't know whether it did or not.

Q. That is what I am coming to. You were opposed to that contract, weren't you?

A. I definitely was.

Q. And you went around Butte talking to Mine-Mill members against that contract, didn't you?

A. I said it was the greatest Communist Party sell-out that I had ever seen.

Q. There was a big meeting in Butte at the Civic Auditorium, was there?

A. Yes.

Q. At which the membership voted whether to accept that contract?

A. They voted to submit it to ratification after a committee reported there was a dead end there was nothing left for them but to accept.

Q. And thereafter was there a referendum to decide whether the membership would ratify the agreement?

A. There was.

Q. And you went around opposing ratification of the agreement?

A. No, sir, I did not.

Q. You were opposed to it before the Civic Auditorium meeting, is that right?

A. I was.

Q. Did the membership ratify the agreement?

A. The membership ratified it because there was no other answer to their problem.

Q. And did thereafter—strike that, please. Thereafter did you have difficulties with Board member Salva?

A. I don't recall any difficulties with Board member Salva.

Q. You remember attending a Mine-Mill Board meeting?

A. I—

Q. Just a minute, Mr. Gardner. —in Denver?

A. I very definitely do.

Q. You drove down with Salva?

A. I did.

Q. And do you remember a staff meeting up in Butte before you left for Denver?

A. I did on my resolution to ask Travis to resign from the union because of his membership in the Communist Party.

[fol. 863] Q. And at that staff meeting—

Mr. Witt: Your Honor, I move that that part of the witness's answer where he referred to Travis and the Communist Party be stricken and the jury be cautioned to disregard it.

The Court: Well, I think I will sustain the motion. You will disregard that last statement. Proceed.

Q. Now, Mr. Gardner, at this same Board meeting did Mr. Salvas discuss with you in front of the other staff members his difficulties with you?

A. He discussed with me specifically a meeting that was held in Butte on the question of the failure of the International Union to get a resolution supporting Travis, and he discussed with me my failure at that time to support the position of the International Union on the question of Travis's continued leadership in Mine-Mill. My position was that the Communists had destroyed a once proud union and I just didn't want to see the remnants of it scattered further.

Mr. Witt: I move that that part of the witness's answer in which he referred to the Communist Party and what it had done be stricken and the jury be cautioned to disregard it.

The Court: The motion will be denied, and the answer will stand.

Q. Now, Mr. Gardner, at the Board meeting in Denver with the difficulties between you, on the one hand, and Salvas, on the other, and the staff members in Butte, on the other, were they discussed in front of the full Executive Board of the International Union of Mine, Mill and Smelter Workers?

A. Yes, they were.

Q. At that Board meeting did you and Salvas agree that you would make every effort to work together for the good of the Union?

A. I believe we did.

Q. And went back to Montana together with Salvas?

A. Yes.

The Court: Where is this matter touching on the subject you advised the Court you were going to connect with the discharge?

Mr. Witt: I am about done.

[fol. 864] Q. After you got back to Montana you had other difficulties with Salvas, didn't you?

A. I certainly continued to oppose the Communist policies in that International Union, because they were destroying the union, and he supported those policies. In that sense, yes.

Mr. Witt: I move that the witness's answer be stricken and that the witness be cautioned not to make these prejudicial, deliberately prejudicial statements and speeches and that the jury be cautioned to disregard this last speech of the witness and not to give it any attention in its deliberations.

The Court: The motion will be denied. You asked him if he had any further difficulties or something to that effect with Mr. Salvas, and he is simply reciting what it was.

Mr. Witt: We pass the witness, if the Court please. We are done with our cross examination subject to this problem in chambers.

The Court: Any redirect?

Mr. Kelley: May we have two minutes to see if there is is (sic) anything further on redirect?

The Court: Yes. I don't think we need a recess. You can confer there.

Mr. Kelley: No redirect, your Honor.

In Chambers

The Court: What is it you wish to say?

Motion to Produce Grand Jury Testimony of Gardner and Denial Thereof

Mr. Witt: At this time, your Honor, in view of the fact that your Honor denied the motion for this man's grand jury testimony that we made at the end of his direct testimony we now move that your Honor direct the production of this witness's testimony before the grand jury in this court in 1956 relating to this defendant Travis and particularly as to the two incidents the witness testified about,

one, the Canadian trip, and, two, the talk with Travis at Travis's house in Denver in June, 1953. We ask that this [fol. 865] testimony be produced directly to the defense and in the alternative that it be produced to your Honor first, and, if your Honor finds contradictions between that grand jury testimony and this man's testimony in open court, that your Honor then make that testimony, that grand jury testimony available to the defense for further cross examination.

The Court: What is the basis for the production of the grand jury records?

Mr. Witt: All right, sir. We think the case here is even stronger than we thought it was in the case of Eckert. In the first place, to brush aside one legal problem Mr. Kelley mentioned when we were discussing the witness Eckert, Mr. Kelley pointed out that that Alper case in the Second Circuit said that, if the job is a relatively simple one with limited compass, then the Court could be called upon to do it. We think that is the situation here, because the witness testified only basically about these two incidents, that is what we are talking about, without the colloquy and interruptions, objections, and all the rest of it that could have been given in five minutes probably, 10 at the most, and the same thing would be true if he testified about those two incidents before the grand jury. So, the problem is not burdensome.

As we see it, this man's testimony is incredible from the point of view of his testifying that he had not told the FBI or any Government attorney in the past about them with the possible exception of his talk with Mr. Kelley before he took the witness stand here after he came in from Cleveland. It is particularly incredible, your Honor, in view of that part of the documents furnished the defense under Section 3500 and that particular page where he talks about his stopover in Denver in June of '53 and where he reported about what Sanderson told him which he didn't testify to on direct but didn't report on what Travis told him on that occasion. We think his testimony is just as incredible on the Canadian trip.

This man has been talking to the Government, to the FBI and to Government attorneys and god knows who else

since 1955, and it is just impossible to believe especially since the record shows that he talked to the FBI before the first Travis trial in 1955, it is impossible to believe that he wasn't interrogated about Travis at that time, and it is [fol. 866] impossible to believe that he hasn't been interrogated about Travis on subsequent occasions, and it is impossible to believe that, if he is telling the truth about these episodes, he didn't tell the FBI or Government attorney or somebody representing the Department of Justice, Mr. Broome or somebody, about them.

So, we conclude either that statements under 3500 about these two episodes which should have been furnished to us and have not been without my now implying that they have been deliberately withheld, and it is impossible for us to conclude that there is grand jury testimony consistent with either of the two deductions, one, if he never talked about it before he saw Mr. Kelley here the other day, how he got before the grand jury on those episodes, whom he talked to, and, if he did, then that is also incredible in light of his testimony, and in any event we think we impeached him sufficiently on his memory and on his interest and from every other point of view to undermine his credibility especially in light of the fact that this is not a burdensome task we are entitled to get at the truth.

The Court: Have you anything to say?

Mr. Kelley: The Government objects to being required to produce the grand jury testimony of the witness Gardner given before the Colorado Grand Jury in 1956, first, because there is no foundation whatsoever that has been laid for its production, second, the testimony was given in a case which is pending in this Court in which this defendant is also a defendant and Mr. Witt is also counsel. Further, that the only basis advanced by Mr. Witt is his disbelief, and the cases that I am familiar with, Mr. Witt has produced none that indicate that disbelief by counsel is any basis for production of anything, and the cases with which the Government is familiar the courts very reluctantly lifted the veil of secrecy around grand jury proceedings, in cases of perjury where the perjury was committed before the grand jury or in cases where the testimony is necessary for the defendant to prepare his defense. Well, obviously, this is

not a case of perjury before the grand jury, and it is not necessary for the defendant's preparation for his defense.

Mr. Clark was present on part of the event, and the implication was that he was present all of the time, and he is still President of Mine-Mill and apparently still living in [fol. 867] Denver, and he is not a defendant in any case in this District or any place else as far as I know, any criminal case, so, that there is no, there is no foundation whatsoever for the production of that grand jury testimony, no reason to burden the court no matter what the extent of his reading of the testimony.

The Court: Well, I held the other day and I reiterate that I do not believe that 3500 requires the production of grand jury records per se. That was discussed the other day.

Mr. Witt: We agree with that.

The Court: And I know of no rule or statute or any decision that would warrant ordering the production of the Grand Jury records or minutes or testimony in this case. The cases in which things of that sort have been ordered come within some situation where in rare instances the courts have said the grand jury minutes should be produced, but there has been nothing in the testimony in this case that lays the foundation that would bring it within the rule of any of those cases that I am advised about, and I haven't seen any case that would justify ordering the production of these grand jury minutes or testimony. The motion will be denied.

Mr. Witt: Just one thing for the record, just to answer any implication of what Mr. Kelley said that we want this grand jury testimony as a part of discovery in connection with the Pezzati case, your Honor, that is ridiculous on the face of it, because since Gardner testified in open Court about these two incidents, it is obvious, if he takes the witness stand, if we ever go to trial in that conspiracy case, that his testimony in that case will have to be consistent with his testimony here.

The Court: That factor didn't enter into my consideration in determination of the motion. My determination would have been the same even if there hadn't been such a case around here. We will proceed at 9:30 in the morning with the examination of Mason.

Mr. Witt: That is our understanding.

Mr. Kelley: That is my understanding. May the record [fol. 868] show that Mr. Gardner is excused from further attendance?

The Court: I believe that's right, isn't that the understanding?

Mr. Witt: Yes, we have no objection.

In Chambers

Mr. Witt: Your Honor, we asked for this conference in Chambers because of a problem we ran into last evening in going over these statements with respect to the witness Mason which have been produced for the defense pursuant to Section 3500. In going over these, and I am now referring to pages nine, ten, and 11, two FBI reports, the first one dated August 10, 1953, that is page nine, the second one dated August 18, 1953, pages ten and 11, what we noticed with respect to those two reports is that Mason's name appears at the top of those at the very beginning where it is stated that William Mason orally advised or orally furnished the following information certain dates. We notice that Mason's name appears in a different type than the rest of it. There is very little question in our mind that that is so, your Honor, and I doubt the Government will dispute it.

It also appears from these two reports that Mason in the body of the reports was referred to as an "informant". Your Honor will recall that in the colloquy in Chambers I think it was yesterday, maybe it was Monday, when we were talking about Arthur Morelas when the witness Gardner referred to and I referred to him as a paid informer Mr. Vincent corrected that and said that the correct word for persons who are are (sic) acting as hired hands in the gathering of information to the FBI was "informant", so that there is very little question in light of that that at the time Mason made these—strike that—when Mason gave this information to the FBI on these two occasions in August, 1953 he came in the category of hired hand for the FBI or at least a person who was giving information to the FBI confidentially, secretly.

Now, I assume from my experience with this problem before the SACB in the case of Morelas that, if I am right in saying that Mason was an informant, he had what I understand the Bureau refers to, and I get this also from the Morelas testimony before the SACB and the reports [fol. 869] submitted by Morelas to the FBI while he was an informant, which reports were introduced by the Government in that case and copies of which were furnished to us, and every informant has a so-called code name, at least it was true in Butte. It happens that these reports of Mason were given to the FBI in Butte where Morelas's reports were given to the FBI. Therefore, we think we are entitled to the original name or the name that appears on the originals of these FBI reports at the very beginning which would be the code name for William Mason.

The Court: Well, that naturally would not be a part of his statement. Obviously, that would be something independent of any statement he made if there was a code symbol. I think that was the situation where the name has been typewritten in with a different typewriter, isn't that right?

Mr. Vincent: That's right, sir.

Mr. Crandall: That's right.

The Court: That clearly and surely and certainly was not a part of his statement that he made and was simply a designation by the agent making the report and, therefore, would not come within 3500 or any other theory that I know of.

Mr. Witt: May the record show so we know what we are talking about and the record will be clear, whether the Government took out the code name for Mason and typed in his full name "William Mason" before submitting these statements under 3500 to the Court or whether the Court decided it.

The Court: The Court decided that.

Mr. Witt: The code name wasn't part of the statement?

The Court: The Court decided the code symbol wasn't a part of the report, and, in fact, there were some other reports that were furnished in the same category. In the Eckert report there were some in the same category if my memory serves me.

Mr. Witt: May the record show that we object to that procedure on this question, and it serves to deprive us of [fol. 870] the right of cross examination.

Mr. Crandall: May I just interject here a moment? I would like to correct the record. I think Mr. Witt said that Mr. Vincent stated yesterday that an informant was a hired hand. I think that is completely contrary to the fact.

The Court: I don't know, there is no question about that. I don't know what the point is about that.

Mr. Crandall: That is merely an assumption on Mr. Witt's part.

Mr. Witt: In this connection may the record show that with respect to all these witnesses on the problem of the statements under 3500 I think the record is clear but out of an abundance of caution I say this now for the record: that it is our continuing position that 3500 is inapplicable to this case in any event, because the indictment was handed down October, 1954, and there was a first trial in November and December, 1955, before this all became effective in December, 1956.

The Court: I think my recollection is you raised that same point.

Mr. Witt: Yes.

The Court: But anyway, the record may show that your motion is denied.

Mr. Witt: I have one other point in connection with these reports by the informant, William Mason, we think we are aslo entitled to receive whether it is under 3500 or not, I do not think it is, from the Government a record of any payments made to William Mason, as I said, if any, in connection with his being an informant for the FBI. May I just say this one word on that, Your Honor? Again, in the case of Arthur Morelas before the SACB which, of course, was a civil procedure, merely an administrative proceeding where the Government itself put in the Morelas reports to the FBI during the period he served as informant we made a similar demand in order to be in a position to cross-examine Morelas, and the Government furnished the record of payments to Morelas. That is why I was able to [fol. 871] say the other day that Morelas received a total of $12,000. We think we are entitled to that from the Government.

The Court: What is the Government's position about that?

Mr. Kelley: I would think it would develop on cross examination that he did receive payments. I think it is premature at least if nothing else.

Mr. Witt: We do not think this is a matter for cross examination. Under Jencks and under other cases the prosecution knows whether Mason was paid, and we think it is an obligation of the prosecution to tell us now before we cross-examine this man. If Mr. Kelley wants to make a statement off the record—

The Court: Do you know of any authority or precedent that would warrant that?

Mr. Witt: I think we are entitled to it under Jencks. There is the precedent cited before the SACB in the case of the Attorney General vs. Mine-Mill under the Act of 1954.

Mr. Kelley: Both of the previous witnesses you have gone into that as to what they received on cross examination.

Mr. Witt: They were not witnesses as to whom we had any information whatever that they were informants especially during the period say that they were with Mine-Mill. These reports, I have referred to, these two in August, 1953, as I said, indicate clearly that Mason was an informant not only because of the different typing used in connection with his name—

The Court: What is the difference? I do not get the significance of it.

Mr. Witt: The difference is, your Honor, if a man serves as an informant for the FBI confidentially and furnishes them information and acts as a collector of information at the time, the SACB case and dozens of other cases in recent years prove conclusively that in every such case the informant is paid by the Government for his work as a stool pigeon.

[fol. 872] The Court: I do not know of any significance to that, and I know of no case that makes that distinction. You have asked these other witnesses if they were compensated, and, of course, that would probably be admissible showing possible interest or something of that sort, but I see no basis on the face of this presentation to require the Government in advance to produce anything about payments to the witness. I think you can interrogate as you have these others with respect to that. Something then

might arise that conceivably might justify it, but I don't know about that. I think we had better meet that when it comes.

In Open Court

WILLIAM MASON, resumed the stand, testified:

Cross examination.

By Mr. Witt:

Q. Mr. Mason, you have given testimony about Travis and Mine-Mill on other occasions before you took the witness stand in this trial, haven't you?

A. Yes.

Q. Will you give us all those occasions to the best of your recollection?

A. I testified at the trial of Travis.

Q. You mean at the first trial in this case?

A. Two years ago I believe.

Q. When was that more exactly if you remember, what month and what year?

A. It was late in 1955.

Q. All right, sir. Any other proceedings in which you have testified about Travis or Mine-Mill?

A. I don't recall any other testimony on Travis.

Q. Well, didn't you testify before the NLRB in the so-called decompliance case?

A. Yes.

Q. And didn't you give testimony there about Travis?

A. Not particularly. I testified there on the Mine, Mill & Smelter Workers.

Q. Well, didn't you give testimony in that proceeding about some conversations with Travis?

A. Yes, there was some testimony I recall now on Travis also.

Q. And that testimony related to some of the same conversations about which you testified in this trial on direct examination, didn't it?

A. Yes.

Q. And you testified about those conversations or some [fol. 873] of them the same as you testified on this trial when you testified on the first trial in this court against Travis, didn't you?

A. I am sorry, I didn't get the question.

Mr. Witt: Well, it is a little complicated.

Q. When you said you testified against Travis in this court in late 1955, you said that a few minutes ago, right?

A. Yes.

Q. When you gave your testimony on that occasion did you give testimony about the conversations or some of the conversations that you have given on the witness stand in this trial?

A. Yes, some of the testimony.

Q. Also, before the NLRB aside from Travis you gave other testimony about Mine-Mill, didn't you?

A. Yes.

Q. Now, have you testified before any grand juries about Travis or Mine-Mill?

Mr. Vincent: If your Honor please, the Government objects to that.

The Court: I will sustain the objection.

Q. Mr. Mason, have you given testimony before a grand jury in this court about any of these conversations with Travis that you testified on direct examination here last week?

Mr. Kelley: Same objection.

The Court: The objection will be sustained.

Mr. Witt: May we approach the Bench, your Honor?

The Court: If you have anything, you can approach the Bench, yes.

(Conference at the Bench.)

In Open Court

Q. Mr. Mason, have you given testimony before any grand jury on any subject—

[fol. 874] Mr. Kelley: May it please the Court, that is subject to the same obligation.

The Court: I will sustain the objection.

Mr. Kelley: There is no relevancy apparent.

The Court: If you have any grand jury session in mind, you can ask him if he testified before the grand jury without reference to the subject matter.

Mr. Witt: I said any subject matter.

The Court: You said any grand jury. The objection will be sustained.

Mr. Witt: I wasn't going into the subject matter, but I will try it the other way.

Q. Mr. Mason, have you given any testimony before any grand jury?

The Court: You need not answer the question. The objection will be sustained. That covers all times and all occasions. That would not have any relevancy unless there is something that connects it with this matter here.

Q. Mr. Mason, have you testified before—strike that. Do you know when it was that you testified before the NLRB?

A. Yes, it was sometime in 1954.

Q. Do you remember the month?

A. No. It would be towards the middle of the year.

Mr. Witt: May I talk to Mr. Kelley a moment and see if we can't get a stipulation?

The Court: Yes.

Mr. Witt: Based on my off-the-record conversation with Mr. Kelley I propose a stipulation that Mr. Mason testified before the NLRB in the so-called decompliance case in May of 1954.

The Court: Is that right, Mr. Kelley?

[fol. 875] Mr. Kelley: That appears to be right, your Honor. It has a stamp on here.

The Court: The witness said it was sometime in the middle of the year. I don't get the significance of it.

Mr. Kelley: I don't know why we are stipulating particularly.

The Court: What is the point, Mr. Witt? The witness has fixed the time of the year he testified.

Mr. Witt: I am intending to use the transcripts. It is just so the witness won't dispute it. I am not impeach-

ing him as to the date. I want to get the testimony clear so your Honor can follow it and so the jurors can follow it so we don't get into these delaying hasties (sic) when we get to using this testimony in our effort to impeach the witness later.

The Court: Well, if it has any significance, do you stipulate that he testified on that date?

Mr. Kelley: Well, I will stipulate it was during the month of May, yes.

Mr. Witt: Nineteen fifty-four?

Mr. Kelley: Nineteen fifty-four.

Q. Now, at any time since the month of May, 1954, Mr. Mason, have you testified before any grand jury?

Mr. Kelley: I object to it for the same reason.

The Court: I think I will sustain the objection.

Q. Mr. Mason, did you testify before a grand jury in this court in 1954?

A. Yes.

Q. Mr. Mason, did you testify before a grand jury in this court in 1956?

A. I don't understand the question as it relates to "court".

Q. In this courthouse, in this building.

A. Yes.

Q. Mr. Mason, on these occasions when you testified, I [fol. 876] am referring to all of them, the two Travis trials in this court and the two grand juries and your appearance before the NLRB in May, 1954, were you paid a per-diem and a witness fee?

A. I think I was paid a witness fee.

Q. And were you paid a per-diem?

The Court: What do you mean by that?

Mr. Witt: I am sorry, your Honor. I intended to say mileage and a witness fee.

Q. I am asking you now, Mr. Mason, whether you received mileage and witness fees in connection with these appearances as a witness.

A. Yes.

Q. And in connection with any of these appearances did you receive so-called expert witness fee?

A. No.

Q. Mr. Mason, you testified last week on direct examination that at one period you knew Travis as an Acting Board member for District 7, do you remember that?

A. Yes.

Q. Do you remember—strike that. You were elected Board member in 1945, weren't you?

A. Nineteen forty-four.

Q. You took office in 1945?

A. Yes.

Q. Do you recall whether Travis—strike that, I am sorry. Did you attend the Executive Board meeting of Mine-Mill in February, 1946, in Chicago?

Mr. Crandall: I object, your Honor. That is beyond the direct examination.

The Court: What is the situation, Mr. Witt?

Mr. Witt: He testified on direct that Travis was Acting Board member. Now, I am simply trying to fix the time, if the witness remembers, when Travis was Acting Board member.

The Court: Why don't you ask him that? I do not see the significance of this meeting. If the fact is—

Mr. Witt: It is just preliminary. I will do it the other way. There are a dozen different ways of doing it. It doesn't matter.

Q. Mr. Mason, you recall the period when Travis was Acting Board member for District 7?

[fol. 877] A. I testified, and I think at this time that it was the latter part of '45.

Q. And until when if you recall?

A. I can't recall.

Q. You don't recall until when?

A. It was a brief period of time.

Q. Then, I will ask you whether you attended the Executive Board meeting of Mine-Mill in Chicago in February, 1946.

Mr. Crandall: I will object. I don't see any relevancy.

The Court: I think I will let him answer if he can recall.

A. I can't recall. I have not missed very many Board meetings.

Mr. Witt: Would you read that answer, Miss Marson?

(The reporter read the last answer.)

Mr. Witt: This has already been marked, if the Court please, through the testimony of another witness.

Q. Mr. Mason, I will ask you to look at Defendant's Exhibit C for identification and ask you whether you know what that document is.

A. Yes.

Q. Will you tell us what it is?

A. Those are the minutes of an Executive Board meeting.

Q. I will direct—in February of 1946 in Chicago?

A. That is the date on the minutes.

Q. I direct your attention to the list of names of people indicated to be present at the top of the first page and ask you whether that refreshes your recollection that you attended that Board meeting?

A. Of course.

Q. What?

A. Of course.

Q. Now, I will ask you whether you remember whether Travis attended that Board meeting as an acting Board member of District 7.

Mr. Kelley: May it please the Court, he is asking him to use that to in effect testify from it, and it is not in evidence.

Mr. Witt: I should have asked him to give it back to me.

Q. I will ask you from your recollection now that you [fol. 878] recollect attending that Board meeting whether Travis attended that Board meeting as Acting Board member for District 7.

A. I don't recollect, but his name appears on the minutes. It would seem that he did attend.

Q. Do you—strike that, please. Who had been elected Board member for District 7 at that time?

Mr. Crandall: I object, your Honor. I do not think that is within the scope—

The Court: The relevancy doesn't appear from the question. What is the relevancy, Mr. Witt?

Mr. Witt: Well, may I approach the Bench on it? I do not think we should have this discussion in the hearing of the witness.

The Court: The record isn't intelligible unless we have this.

Mr. Witt: We should get it in the record. It is difficult to get these things in the record and have the Bench conferences outside of the hearing of the Jury and the witness. I haven't wanted to make the suggestion before, because the trial has been badly disrupted already.

The Court: What is the relevancy of who was the Board member in District 7 at this time?

Mr. Witt: I object to stating in the hearing of the witness and the Jury what I am trying to show by this. I do not think it is fair to the defense.

The Court: You can pass it now, and, if it is necessary to be taken up outside of the presence of the Jury and the witness, you can take it up at the first recess.

Q. Mr. Mason, you testified on direct examination that in 1947 after Taft-Hartley became effective Mine-Mill decided not to comply. I will ask you whether you at that time as a Board member supported that position.

A. Yes, I did.

Q. I think you testified on direct examination that Mine-Mill did not comply in 1948. I will ask you whether you supported the policy of noncompliance in 1948.

[fol. 879] A. I went along with the policy.

Q. I will ask you whether you voted for that policy as a member of the Executive Board?

A. Yes, I believe I did.

Q. You testified that in 1949 Mine-Mill decided to comply. I will ask you whether you supported the policy of compliance in 1949.

A. Yes, I did.

Q. Mr. Mason, at any time since 1953 have you furnished information to the FBI about Travis?

A. Yes.

Q. On any, on one occasion or on more than one occasion?

A. On one occasion.

Q. When was that if you recall?

A. I believe it was sometime in 1953.

Q. Do you remember the month?

A. No, I don't.

Q. On that occasion did you give the FBI something in writing that you had prepared?

A. No.

Q. On that occasion did you talk to an FBI Agent or FBI Agents?

A. Yes.

Q. And you gave them information about Travis?

A. Yes.

Q. Well, Mr. Mason, don't you recall furnishing information to two agents of the FBI in Butte on June 7, 1955?

A. I don't recall the instance, no.

(Document marked Defendant's Exhibit P for identification.)

Mr. Witt: If your Honor please, if I recall the procedure we agreed upon, I now want to offer into evidence and read into the record so that the witness can hear it the part of Defendant's Exhibit P for identification beginning at the bottom of our page 34, I am sorry, beginning at the bottom of our page 35 and running to the top of page 36 being one paragraph.

The Court: What is the Government's position?

Mr. Kelley: Did you offer it in evidence?

Mr. Witt: Yes.

The Court: He wants to offer it in evidence and read it. He wants to read it into evidence.

Mr. Kelley: Well, the Government objects to it for the reason that the exhibit appears to be a report of an FBI [fol. 880] Agent which is not substantially verbatim, and there is no showing that it has been adopted or approved by the witness as his own statement, and it is not contemporaneously reported. The interview apparently in which the agent obtained some information from the witness appears to have been on June 7, and the date when the report was made was June 21 which would be two weeks later. So, it was not contemporaneously made, and, therefore, this is not a statement of the witness under Section 3500,

and we, therefore, object to its being introduced in evidence or used on cross examination.

The Court: I do not believe that is a valid reason on the basis I have indicated a number of times in ruling on this, but I question whether the matter should be received in evidence at this time without further interrogation of the witness and giving him an opportunity to refresh his recollection. He has answered that he doesn't recall talking to them in 1955. He hasn't said that he didn't, and it would not be contradictory. I think, if Mr. Witt wishes to show the witness what he has in mind and ask him if that refreshes his recollection and ask him if he did have the meeting and recall making that statement, I think that would be the proper way to proceed.

Mr. Witt: I have tried to proceed that way unless I am sadly mistaken, and your Honor suggested this other procedure. I will follow any procedure at any time.

The Court: I do not recall that I suggested that procedure except as to the method of putting it in evidence when it was admissible in evidence.

Mr. Witt: Your Honor may be right. Just one correction I may suggest in Mr. Kelley's statement about this matter. He referred to the fact that this information was furnished by the witness to an agent on June 7, 1955.

The Court: Let's not get into a dispute.

Mr. Witt: I just—I think the record will be confused, a very minor point, but I think we should be more exact than Mr. Kelley is, this shows that Mr. Mason talked to two agents on June 7, 1955. That is all. Mr. Kelley said "agent", and the word should be "agents".

[fol. 881] The Court: You may show that to Mr. Mason and ask him if that refreshes his recollection and if he did make that statement.

Mr. Witt: All right.

Q. Mr. Mason, I show you Defendant's Exhibit P for identification and ask you to read as much of the first and second pages as you want to, and then I direct your attention to the bottom of page six of the statement.

Mr. Witt: Your Honor and Mr. Kelley, so the record won't be confused, that is page 35 of our arbitrary system of numbering.

The Court: All right.

Q. This paragraph beginning at page six of the report and which paragraph is continued at the top of page seven of the report, and I ask you if that doesn't refresh your recollection that on June 7, 1955, you talked to Special Agents W. E. Kreitner, Jr., and Thomas H. Zoller, in Butte, Montana.

The Court: Is there a question pending?

Mr. Witt: Yes.

The Court: What was it?

Mr. Witt: The question was, I tried to pursue the suggestion made by your Honor and ask him if that refreshes his recollection if in June, 1955, he made that statement contained in that paragraph.

The Court: I think the first thing is, he made the statement. I mean, if he recalls the occasion, and then you can ask him if he didn't say so and so at that time. I think there is a double question in what you are asking.

Mr. Witt: Anything your Honor suggests. I want to get it over as soon as possible without these difficult delays in my cross examination.

Q. Mr. Mason, does that refresh your recollection that on [fol. 882] that date that you talked to those two agents in Butte?

A. What is that date again?

Q. You were just looking at it. I will ask you to look at it.

The Court: You can ask him the date.

Mr. Witt: All right. I will have to look at it again myself.

Q. On June 7, 1955.

A. I don't recall much of this meeting, but from reading through that I certainly did meet with two representatives of the FBI, and I can remember at least some of the statements contained there in that.

Mr. Witt: Will your Honor be kind enough to direct the witness to keep his voice up a little?

The Witness: I am sorry.

The Court: Will you raise your voice a little bit, sir?

Q. Now, I am directing your attention, Mr. Mason, again to that paragraph beginning on page six of that report and which is concluded on page seven. If you haven't had a chance to look at it sufficiently, will you look at it again and see whether it refreshes your recollection that you gave those two agents the information contained in that paragraph?

A. Yes, I believe in substance I remember the statement I made to the FBI.

Mr. Witt: At this time, your Honor, I offer that paragraph in evidence.

The Court: Does the Government have any objection other than the one they mentioned a moment ago?

Mr. Kelley: We would object to just that portion being taken out of context. We would have no objection to the full report going in, but that part taken out of context is meaningless. It takes the whole report to give any meaning to it and understanding. So, we object to it for that reason.

The Court: That will be a problem for redirect examina-[fol. 883] tion. If you have no objection other than you stated, the portion indicated may be read in evidence.

Mr. Crandall: If it please the Court, I would like to ask Mr. Witt the purpose for which he is offering this. Is it to impeach the witness concerning information given against Mr. Travis or against Mine-Mill?

Mr. Witt: Mr. Travis.

Mr. Crandall: Well, I do not think that he has laid a proper foundation in offering this, because I do not think that there is any evidence here yet to show that this report relates to Mr. Travis or whether that the witness actually gave the information concerning Mine-Mill.

Mr. Witt: I do not know what Mr. Crandall is trying to say.

The Court: Let me see the report.

Mr. Witt: Mr. Kelley has been meeting it, and that relates to Mr. Travis.

Mr. Crandall: I think actually, if you will observe the report, that the report pertains to Mine-Mill more than it does to Mr. Travis.

The Court: What is the part that you propose?

Mr. Kelley: The part he proposes is on six and seven.

The Court: It is this bottom paragraph on 35 and the top of 36?

Mr. Kelley: Yes, your Honor.

The Court: Mr. Witt, what you propose to read is the bottom paragraph on 35 and down to the end of the same paragraph on 36?

Mr. Witt: Yes, sir.

The Court: All right, I think the objection will be over-[fol. 884] ruled, and you may read that in evidence.

(Defendant's Exhibit P for identification received in evidence.)

Mr. Witt: "Mason advised that from the time of the 1946 IUMM & SW elections, Travis and he became more intimately acquainted. In all conversations, Travis, probably out of respect to Mason's knowledge of the Union, and the Party and its program, always spoke freely about his being a Party leader, about Party forces in the Union, and the Party program in general. Mason states he is unable to enlarge on this information as to dates, places or specific individuals or incidents."

Q. Now, Mr. Mason, I understood you to testify a little while ago in answer to one of my questions that there was only one occasion that you recalled on which you gave information to the FBI and that was sometime in 1953. Now, I don't know whether you want to look at this—

The Court: I do not know whether that is an accurate statement or not.

Mr. Witt: The record will show.

The Court: I know you asked him if he had given any information in '53, and he fixed that, but I don't know that he said that was exclusive—

Mr. Witt: That is my recollection, your Honor. The prosecution is sitting at that table, and I think it is the responsibility of the prosecution, your Honor, to correct me if I am wrong. I do not want to be wrong. I am making every effort to be right despite these constant interruptions and this apparent deliberate effort to discon-

cert my cross examination and to confuse the Jury about what is going on. In this connection, your Honor, I ask that no more than two of the Government lawyers speak on any particular issue since the defendant has only two lawyers, and I am afraid the way this is going that we will be hearing from all three prosecutors on these problems before we are through.

The Court: I think normally one can make the objection, [fol. 885] and then they can confer among themselves and decide. If there is any argument, then we can consider that at the time. But I think probably one had better make the objections.

Mr. Kelley: Yes, your Honor, and in regard to what Mr. Witt was just saying about his recapitulation of what the witness had testified to I think he was very vague in his questions in regard to the reports that the witness made to the FBI, it wasn't clear to me whether he was talking about 1953—

Mr. Witt: I object to this in the hearing of the witness. I object to Mr. Kelley arguing to the Jury this way, and the way to solve this, if the Court please, without any of these problems is to go back to the record and see what the witness said. Furthermore, if any of my questions are vague, Mr. Kelley is here representing the Government, and he can always object if he thinks the questions are vague. He has made no such objections, and neither has the witness.

Mr. Kelley: I am making them now.

The Court: I think you may proceed with the question, restate your question. You obviously in your question, the way you stated it, it stated an assumption of what you understood he testified to. If you wish to ask him specifically, you may do so.

Mr. Witt: I want to ask him the question I put to him. If there is any doubt about it on Mr. Kelley's part or on your part, then I must insist that we go back to the record and see what the witness testified to. It is extremely difficult to conduct cross examination under these conditions, and I insist that we know exactly what we are talking about at all times. I do not want to guess, I do not want to waste my time and energy, if the Court please, repeating

all this, because I do have the feeling that there is a deliberate interference with our right of cross examination, and—

The Court: The objection to the question in the form it is propounded will be sustained. The Court was simply trying to keep the record so that there would not be any misunderstanding, and the matters the Court mentioned were intended to be helpful to you, Mr. Witt, and with no other purpose whatsoever, and to be sure that the question [fol. 886] asked the witness was in proper form which is the Court's duty here. Now, you may proceed to interrogate the witness, and the objection to this particular question will be sustained.

Mr. Witt: Your Honor, I am sorry, of course I didn't imply any improper attitude on the part of the Court, but in view of this colloquy it could be I am wrong. I do not want to have my energy and my time exhausted and the time of the Jury taken with these problems, and the easiest way to clear it up before your Honor rules is to go back to the record. If we had done that, your Honor, we would have saved five minutes already, and it would all be clear. I don't think your Honor should rule on it, I ask you to reconsider, until we go back to the record and see what this man testified to.

The Court: Well, I do not see any basis for it, because you summarized what you thought the testimony was, and you can ask him, you can ask him right now when or on what occasions or anything else he talked to the FBI. You have a perfect right to interrogate with respect to the details. So, I think you may proceed on that basis.

Mr. Witt: All right, sir.

Q. Mr. Mason, I will ask you to answer the question just suggested by the Court if I followed it. Can you tell us on what occasions since you first became an Executive Board member of Mine-Mill, or, rather, since you became an Executive Board member of Mine-Mill in 1944 that you furnished information to the FBI about Travis.

A. I testified earlier this morning that—

Q. Mr. Mason—

Mr. Witt: Now, if the Court please, in view of the colloquy I didn't ask him what he testified to this morning.

The Court: You can answer the question, Mr. Mason. If you wish it read again, it can be read to you.

A. Well, I repeat to the best of my recollection I testified or, rather, I gave the FBI information on Travis on one occasion. I did not prepare it. It was prepared—

[fol. 887] Q. I didn't ask you that, Mr. Mason.

A. The other—

Mr. Kelley: Let him finish the answer. You are giving all the directions around here. Let's show some courtesy to the witness.

Mr. Witt: Let's put it to the Court.

The Court: He is entitled to answer the question. If there is any question about it, you can read the question. You might read the question to Mr. Mason.

Mr. Witt: The only reason I interrupted it seemed obvious to me Mr. Mason was going to another subject about which I didn't ask him. If there is any question about it, let's go back to the question.

The Court: Read the original question, and, Mr. Mason, you can direct your answer to that question.

(The reporter read the question, as follows: "Mr. Mason, I will ask you to answer the question just suggested by the Court if I followed it. Can you tell us on what occasions since you first became an Executive Board member of Mine-Mill, or, rather, since you became an Executive Board member of Mine-Mill in 1944 that you furnished information to the FBI about Travis.")

A. I didn't complete the answer if I recall.

Q. Will you start again, Mr. Mason?

The Court: Go ahead and reanswer the question.

A. I recall giving information to the FBI on Travis in 1953. I did not prepare the information.

Mr. Witt: I object to that again.

The Court: He asked you when you gave the information. He didn't ask you about a statement.

A. I am sorry. I recall being asked by the FBI in another meeting if I would testify against Travis.

[fol. 888] Q. I didn't ask you that, Mr. Mason. I simply asked you to the best of your recollection to tell us the occasions since 1944 when you furnished information to the FBI. Now, aside from the one occasion in '53 do you recall any other occasions on which you furnished information to the FBI?

A. Information on what?

Q. On Travis.

A. I don't recall any other time.

The Court: I guess your assumption is right, Mr. Witt.

Mr. Witt: Thank you, your Honor. I appreciate that, your Honor. I wasn't absolutely sure. That is why I suggested we look at the record.

Q. All right, now, Mr. Mason, I show you Defendant's Exhibit P for identification and ask you to look at the first two pages of that report, again for clarification of the record which happen to be our pages 32 and 33, and ask you if those pages don't refresh your recollection that you furnished information about Travis to the two agents in June of 1955.

Mr. Kelley: I think he has already testified to that.

The Court: I think he has testified to that, Mr. Witt.

Mr. Witt: It could be. I am confused.

The Court: I do not want to confuse you further, but isn't that the meeting that he just admitted this evidence about?

Mr. Witt: Assuming that he did, I thought to get the continuity, again, to avoid a long colloquy, I think it will take a moment to get an answer. I think your Honor must be right, because otherwise, I could not have read that paragraph into the record. So, we are even.

Q. Now, Mr. Mason, going back to your testimony before the NLRB in May, 1954, you testified this morning from the witness stand in that proceeding you gave testimony about some of these conversations that you had with Travis. In that testimony before the NLRB did you make an effort to fix the dates and the places of these conversations?

[fol. 889] Mr. Kelley: May it please the Court, that is improper type of cross examination.

The Court: I think I will sustain the objection on this basis: that you can ask him specifically if he made such and such a statement in that period. This way it taxes his memory on two things, whether he testified to it, and whether he fixed the date.

Mr. Witt: Could I just make this statement? I thought I would try it the other way. It will take us a half hour to go through that repetitious testimony before the NLRB. There is no question in my mind, since I cross-examined Mr. Mason on that occasion, since I cross-examined him again about that testimony before the NLRB, when he testified in the first trial, and there is no question about Mr. Mason's answers, and Mr. Kelley knows it having been the prosecutor in the first trial.

The Court: The point I am making is that when you make a question in that form, when he testified in a hearing and fixed a certain date, he may be able to fix the date in his mind but not recall that he testified at the hearing. That is the only vice of it.

Mr. Witt: All right.

Q. When you testified before the NLRB you testified about a conversation with Travis about his proposed resignation from the Communist Party, do you remember that?

Mr. Kelley: May it please the Court, it is the same objection, the same procedure he was following.

Mr. Witt: I thought that was the Court's suggestion. I am trying to get the date out of him without ploughing through here.

The Court: I think I will let him answer the general question if he can recall, and then it will have to be something specific, if he recalls testifying as to the subject.

Q. Answer the question.

A. I recall testifying as to the subject.

[fol. 890] Q. In that testimony did you fix the place where that conversation with Travis took place?

A. Yes, I think I did.

Q. And you fixed the time of the conversation in your testimony before the NLRB, is that right?

Mr. Kelley: May it please the Court, he is doing just exactly what the Court suggested was not the proper procedure.

Mr. Witt: The Court agrees I don't have to impeach him. There is no question about this. I am not trying to impeach him in connection with his NLRB testimony. I want to get back to the statement he gave to the FBI in June of 1955, a year after he testified before the NLRB, and the record now shows that a year after he testified before the NLRB he said he was unable to fix dates and places about those things about Travis, and I am showing now that 13 months before he said that—

The Court: I think he is entitled to have the specific testimony on this date. You can simply ask him—I know you are trying to save time—but I think you should ask him if he didn't fix the date as being such and such a date and then refer to the place in the hearing, because, if the witness should recall a different date, I expect we would have some claimed contradiction, so, you should refer to the date he gave in the testimony. I know you are trying to save time, but I think we had better do it that way.

Mr. Witt: All right, sir. Would your Honor give me a moment, because I didn't expect we would have this problem?

The Court: Yes.

Mr. Witt: May I say this, your Honor, I represent and I think Mr. Kelley is familiar with that, that testimony about this particular conversation covered many, many pages, so, I am just taking one at random from one of these volumes, and I think we will dispose of the problem.

The Court: What we are aiming at is the date.

Mr. Witt: Yes, of the conversation and the place.

The Court: You can find one of those places, read him [fol. 891] the question and ask him if that was his testimony, the question and answer.

Mr. Witt: We have agreed that this kind of material doesn't have to be marked for identification.

The Court: Yes.

Mr. Witt: Your Honor, this one I happened to find at random and happens to be from my cross examination of Mr. Mason about that occasion, but it will make the point just as easily. Otherwise, I would have to spend a few minutes trying to find his testimony on direct.

Q. Mr. Mason, first, let me ask you this: You remember when you testified before the NLRB I cross-examined you about that particular conversation with Travis about his resignation, didn't I?

A. Yes.

Q. I asked you a good many questions about that, didn't I?

A. I don't recall all the questions.

Q. Now, Mr. Mason, you remember my asking you the following question and your giving the following answer: "Mr. Witness, coming back to your testimony about your discussion or discussions with Brother Travis in Chicago in the month of July, 1949, I will ask you just once more now that you have slept on it whether there is anything you want to add to that testimony or anything you want to change about that testimony. Answer: I do not at this time wish to change anything in the testimony." Do you recall that question and that answer?

The Court: I don't see the point to that.

Mr. Kelley: That is wholly irrelevant.

Mr. Witt: I said at random. Let me ask him one or two further questions.

The Court: I thought you were trying to fix the date that he fixed in the NLRB hearing as being the date of the conversation he had with Mr. Travis about this resignation.

Mr. Witt: Yes, but I want to remind him first that he testified on direct about it, that is what my question in the NLRB case refers to, and I will ask one or two other [fol. 892] questions and we will get this out of the way.

The Court: Find the place, and, if it takes a little time, we will suspend, or where he fixes the date of this conversation we are talking about.

Mr. Witt: All right. May I sit down while I look for this?

The Court: Yes.

Mr. Witt: I am again going to try to make this shorter. Otherwise, we will have to read page after page. I am sure if the witness is permitted to answer, there will be no problem about it.

Q. Mr. Mason, I direct your attention to page 134 of the transcript of your testimony before the NLRB. I will ask you to read that question by Mr. Foley I am pointing to: "Did Mr. Travis discuss this statement with you," and your answer at the bottom of the page and see whether that doesn't refresh your recollection that you gave testimony before the NLRB about the occasion on which Mr. Travis showed you his proposed statement about his resignation which appeared in the Union paper in August of 1949.

Mr. Kelley: May it please the court, the Government objects to this for the reason that this statement is consistent with his testimony on direct, and the only purpose that I can see is that Mr. Witt is trying to show that this is inconsistent with the condensed statement of an FBI Agent in his report, and it is improper cross examination.

Mr. Witt: I now have two purposes in view of the fact that we have gotten back into the problem this way. May I know what Mr. Kelley is showing your Honor? I think if Mr. Kelley is approaching the Bench, he should advise counsel for the defense. Well, your Honor, I do not think that will give you the picture as Mr. Kelley I think knows.

The Court: Well, I don't know what—I guess this is what Mr. Kelley thinks you asked Mr. Mason to read.

Mr. Witt: Yes. May I make this statement: In view of [fol. 893] the way this has now developed somewhat to my surprise I have two purposes in mind. Shall I say this in front of the Jury? If Mr. Kelley has no objection, then, I will go ahead. I have two purposes in mind: One, to show that even though in 1955 he told the FBI he had this difficulty about fixing the dates and the places of these conversations with Travis that the year before he testified under oath giving dates and places. That is purpose number one. Purpose number two, which has not yet appeared but I am very happy to state it so that Mr. Kelley at least will know, in giving that particular testimony before the NLRB Mr. Mason was mistaken, and he later told the FBI

in one of the statements we have that he was mistaken in that testimony. When he appeared on the witness stand in the first trial in this court against Travis he conceded he was mistaken, and in direct examination on this trial the witness said that that occasion took place in Denver in July of '49 after the executive board meeting that same month in Chicago.

Before the NLRB Mr. Mason testified that that testimony about Mr. Travis's resignation from the Communist Party took place at the Executive Board meeting. This is the second purpose.

The Court: Laying aside this latter, the second part of the objection, that is not in the record at the moment. Going to the first part of the objection, aren't all the matters you mentioned in evidence already?

Mr. Witt: I have spent several minutes trying to get this. What I am trying to get is whether when he testified before the NLRB about that occasion if he did not fix the place and date. That is all I am seeking to achieve.

The Court: All I have been asking you to do is to find something in that that fixed the date.

Mr. Witt: I found that. I will find another place if Mr. Kelley isn't satisfied.

The Court: I do not find where any date is fixed.

Mr. Witt: It refers to July, '49.

The Court: He has already testified on direct examina-
[fol. 894] tion that he testified about this subject before the National Labor Relations Board.

Mr. Witt: All I want to do is to fix, to get it from the witness, and I am sure the witness will agree with me that I don't have to show him any part of this transcript before the NLRB for him to say that when he testified before the NLRB he said this conversation took place in Chicago in July, 1949, during the course of the Executive Board meeting.

The Court: Ask him that, and I think that will simplify it.

Q. Answer the question.

A. What is the question?

Q. The question is whether when you testified before the NLRB about your talk with Travis about his proposed resignation from the Communist Party, the conversation in the course of which you said he had talked to Ben Gold and the boys or something like that in New York, the same conversation you testified about on direct examination here last week, whether when you testified before the NLRB, I am asking you if you didn't testify that that conversation took place in Chicago during the course of the Executive Board meeting in July of 1949.

A. Yes, I did.

After Recess

The Court: Ladies and gentlemen, you will recall that we had a little discussion here just before recess about the number of lawyers that might properly object to the testimony on each side, and the Court indicated that he thought probably it should be limited to one. Counsel advise me they have agreed that two on either side may object. That's correct, isn't it, gentlemen?

Mr. Kelley: Yes, your Honor.

Mr. Witt: Yes, your Honor. Thank you, your Honor.

William Mason, resumed the stand and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Q. Mr. Mason, when you testified before the NLRB that this conversation with Travis about his resignation from the Communist Party took place in Chicago you were mis- [fol. 895] taken, weren't you?

A. Yes.

Q. Mr. Mason, can you tell us when it was that you found out that you had been mistaken in that respect?

A. No, I can't recall the time that I found out I made a mistake as to cities.

Mr. Witt: Just for continuity in view of the witness's reference to cities I would like to ask the following question.

Q. Mr. Mason, in other words, when you testified before the NLRB you testified that that conversation, you know the one I am referring to, took place in Chicago, and according to your testimony on direct examination here you testified that it took place in Denver, is that right?

A. Yes.

Q. So, the mistake was about the city, is that right?

A. Yes.

Q. It was not about the month, because in both cases you testified it was July, 1949, is that right?

A. I could not recall the day of the month.

Q. No, I wasn't asking you that.

A. Or the exact time.

Q. It was July of 1949 in both cases?

Mr. Witt: I withdraw it. I just wanted to make the record clear. I wasn't seeking to impeach him as to the date.

Q. Do you recall after you testified before the NLRB in May, 1954—or strike that, Miss Marson. I am sorry. After you testified before the NLRB in May of 19— I apologize to the Court. I withdraw that. While you were Executive Board member with Mine-Mill you were in the habit, weren't you, of submitting semi-monthly vouchers for your expenses?

A. Yes.

Q. Were you in the habit of keeping copies of those vouchers for yourself?

A. Yes.

Q. Now, after you testified before the NLRB in May, of 1954, did you examine the copies of your vouchers to check on this particular question as to what city that conference took place in?

Mr. Kelley: May it please the Court, it seems to me that he has established the fact that he made a mistake in his testimony before the NLRB, and there is no need to pursue it further.

[fol. 896] Mr. Witt: This is preliminary. I am going to something else.

Mr. Kelley: This is unnecessary cross examination.

Mr. Witt: It is preliminary to something else, if the Court please.

The Court: Well, on that basis I will overrule the objection.

Q. Do you remember the question, Mr. Mason?

A. Will you repeat it, please?

Mr. Witt: The reporter will read it back, please.

(The reporter read the question, as follows: "Now, after you testified before the NLRB in May, 1954, did you examine the copies of your vouchers to check on this particular question as to what city that conversation took place in?")

A. I knew that the conversation took place, so, I examined my vouchers, yes, trying to determine where I had made a mistake.

Q. And after you examined your vouchers did you determine that you had made a mistake about the city?

A. Yes.

Q. And at or about that time when you determined you made a mistake did you discuss that matter, that particular matter about your vouchers and mistake with the FBI?

A. I recall some discussion concerning the mistake with representatives of the FBI.

Q. And do you recall in the course of that you said you had referred to your vouchers for the month of July, 1949, is that right?

A. I don't hear you. You will have to raise your voice too.

Q. What?

A. I didn't hear you. Your voice is low.

Q. All right, I will keep my voice up.

Mr. Witt: I will withdraw the question if I may.

Q. Do you recall when it was that you discussed that matter with the FBI?

A. No, I don't.

(Document marked Defendant's Exhibit Q for identification.)

[fol. 897] Q. Mr. Mason, I now show you Defendant's Exhibit Q for identification. I will ask you to look at that page and the following page being our page numbers 15 and 16 and ask you to read those two pages to yourself, and I will ask you whether that doesn't refresh your recollection as to when you talked to the FBI about it. I also direct your attention to the top of page one where it states it.

Mr. Kelley: The Government objects to the question for the reason that it is going into a collateral matter. He is trying to show something in regard to his testimony on cross examination, and it is wholly collateral, a collateral issue. He has shown the fact that he made a mistake in his NLRB Testimony, and we object to pursuing this any further as a waste of the Court's time, and I would like leave of Mr. Witt and the Court to approach the Bench and submit this to the Court.

Mr. Witt: Before we do that—

The Court: The only question pending right now is with respect to whether this refreshes his recollection as to the time he gave this information to the FBI.

Mr. Witt: Yes, sir.

Mr. Kelley: Yes, and we say it is wholly irrelevant whether it refreshes his memory or not and when the time was.

The Court: You can answer the question. The question you are raising about the admissibility of any evidence is not before the Court now until Mr. Witt makes an offer to establish something. I think you can ask him if he knows the date.

Mr. Kelley: May I hand this to the Court?

The Court: Yes, you can hand it to the Court.

Mr. Witt: The same document?

Mr. Kelley: Yes, Exhibit Q.

Q. Do you remember the question, Mr. Mason?

A. I am sorry, I don't.

[fol. 898] Mr. Witt: The reporter will read it to you.

(The reporter read the question, as follows: "Mr. Mason, I now show you Defendant's Exhibit Q for identification.

I will ask you to look at that page and the following page being our page numbers 15 and 16 and ask you to read those two pages to yourself, and I will ask you whether that doesn't refresh your recollection as to when you talked to the FBI about it. I will also direct your attention to the top of page one where it states it.")

A. Yes, it does.

Q. Then, does it refresh your recollection that you talked to the FBI about that matter on August 24, 1954?

Mr. Kelley: The Government objects to this line of questioning, it is wholly irrelevant, it is a collateral matter.

The Court: The objection will be overruled as to this matter as to fixing the date. Now, you may proceed.

Mr. Witt: I am not going into the mistake any further.

The Court: Proceed with your next question.

Mr. Witt: All right.

Q. Do you remember the question, Mr. Mason?

The Court: He answered the question I thought.

Mr. Witt: I didn't think so. Mr. Kelley made the objection.

The Court: He can answer the question.

Q. Do you remember the question?

A. Does it refresh my memory as to the date of the conversation?

Q. Yes.

A. No, but the date appears there, and I assume that the date is correct.

Mr. Witt: Then, may the record show, I think it does already, so that it will be clear for the record and for the Jury, that the date the witness just—

[fol. 899] Mr. Kelley: That hasn't been received in evidence.

The Court: No. Let him proceed, Mr. Kelley.

Mr. Kelley: He is going to put in evidence what the document contains.

The Court: You can object when you find out what he wants to put in evidence. I have no idea. Continue, Mr. Witt, and make your offer.

Mr. Witt: All right. My offer is this short sentence from our page 15 which gives the date of this particular conversation the witness had with the FBI.

The Court: If there is an objection, I will sustain the objection to that, because the witness has testified that he has cleared his recollection and that this conversation did take place on the 24th.

Mr. Witt: That is all I was asking. I didn't think it reflected that it did take place on August 24, 1954. That is all I want.

Mr. Kelley: The witness said it did not refresh his recollection as to when it took place, but he assumed that the report was correct. I believe that would be the answer.

Mr. Witt: All right. All I want is to make clear that when he says he assumes the report is correct he assumes it is correct in stating that he furnished this information on August 24, 1954. That is all I want.

Mr. Kelley: I object to it as irrelevant.

The Court: No. If that is all, I think the objection will be overruled.

Q. Mr. Mason, you said that you remembered furnishing information to the FBI about Travis sometime in 1953. Do you remember the month in '53?

A. I was mistaken on that. The only information that I recall furnishing on Mr. Travis is a statement that I signed. [fol. 900] That was in 1955. I was asked on one other occasion something concerning Travis and myself, and I recall, I do not recall more than one interview with the representatives of the FBI on the subject of Travis. There were a number on the subject of Mine-Mill in general. I was mistaken as to the date of this statement which I signed which I had not prepared, but I had read it and signed it as the contents of an interview. To the best of my recollection the only time I discussed Travis was at that time, was 1955.

Q. Can you fix the month in 1955?

A. I can't recall the month.

Q. Now, did I understand you to say that was the statement which had been prepared and that you read it and signed it in 1955?

A. It was a statement that covered the interview between myself and representatives of the FBI.

Q. You had this interview with two agents?

A. I believe there were two present.

Q. And after the interview was it the FBI or agents who prepared this statement that you testified about?

A. It was typed at the FBI headquarters.

Q. And then one or both agents showed it to you and you read it and signed it?

A. Yes.

Q. Mr. Mason, so that will be clear, I will ask you whether you signed any other document containing information about Travis for the FBI any time since 1944.

A. Not that I recall.

Q. Aside from that occasion on which you signed the statement in 1955 I will ask you now whether you recall any other occasions on which you furnished information to the FBI about Travis.

Mr. Kelley: I think it has already been asked and answered.

Mr. Witt: No, sir. I am completing the record. I have a good deal of additional material.

The Court: The only thing that I am wondering about is the use of the "statements". If you change that to your conversations or talks or something of that sort, because I don't know whether you are referring to statements in a technical sense or as conferences.

Mr. Witt: All right, I am sorry. I will be happy to do so. May I have Miss Marson read the question back, and then I can rephrase it?

[fol. 901] The Court: Yes.

(The reporter read the last question.)

The Court: I think it said "statement".

Mr. Witt: I am not sure myself.

The Court: I am not either. All right.

Mr. Witt: Please add to that question "—since 1944."

A. I don't recall any other information given by myself to the FBI on Travis. There were a number of interviews, but—

Q. I didn't ask you anything except about Travis.

Mr. Kelley: Let him finish his answer.

A. There were a number of interviews with the FBI about Communists and Mine-Mill, perhaps Travis's name was mentioned, but I recall no specific information that I gave relating to Travis where Travis was the subject of the discussion.

Mr. Witt: I move that that part of the witness's answer in which he refers to interviews with the FBI in the course of which he furnished information concerning Communists and Mine-Mill be stricken.

The Court: The motion will be denied. One thing is very obvious here, this last date, this August date here that we just had, he admitted that he talked with the FBI Agents on that particular occasion. There is no showing that has to do with Travis. The question was with respect to his own testimony.

Mr. Witt: I am coming to that, but in this connection this witness like all these other Government witnesses is anxious to confuse the Jury about Communism and make them think they are going to pass a verdict on Communism instead of on the guilt or innocence of this defendant under our law. Every single Government witness will never—he has gotten into trouble in an effort—

The Court: There is no occasion, Mr. Witt, for that [fol. 902] speech at all, and the Court has ruled that the answer may stand, and you may proceed.

Q. Before you took the witness stand today did any of the prosecutors or Mr. DeCook suggest to you that when you wanted to stall for a little time on the witness stand that you throw in some statement about Communism?

A. I didn't get that question.

Mr. Witt: The reporter will read it back to you.

(The reporter read the last question.)

A. Of course not.

Q. Now, Mr. Mason, if I understood your answer, you said on these occasions Travis's name may have come into the conversation. Do you recall an occasion in August, 1953, when you had a conversation with Special Agent Zoeller about Travis?

A. I don't recall.

(Document marked Defendant's Exhibit R for identification.)

Q. Mr. Mason, I show you Defendant's Exhibit R for identification and ask you to look at that, read as much of that page and the following pages as you want to, and I will ask you whether that doesn't refresh your recollection that you had a conversation with Agent Zoeller in Butte, Montana, U. S. A., on August 7, 1953.

A. What was the question again?

Mr. Witt: The reporter will read the question.

(The reporter read the last question.)

A. Yes, it does.

OFFER IN EVIDENCE

Mr. Witt: This is a one-page report, Defendant's Exhibit R for identification, and I now offer it in evidence.

Mr. Kelley: Well, your Honor, we have no objection as such to this going into evidence. We do object to this line of cross examination, because it is an attempt to impeach him on his statement on cross examination that he didn't remember how many times he talked to the FBI Agents, and it is purely collateral, and to impeach one it should be [fol. 903] on a matter that is material, and it should be on something that he has testified to on direct examination. For that reason we object to it.

The Court: This goes, as I understand it, it is their contention, to one of the things to consider in connection with the weight to be given his testimony which obviously would not be some matter that arises on direct examination. That is your position, isn't it?

Mr. Witt: It is more than that, your Honor, and I do not hesitate to state it in open court. That is one purpose of it, and the other purpose of it is to show that at that time, which is the period he has testified about, he was telling the FBI about these conversations with Travis about which he testified on direct examination. This man was in touch with the FBI at all times, and we want to show—

The Court: You need not add that. The Jury are going to be the judges of the evidence.

Mr. Kelley: That is just the point. How many times he was in touch with the FBI is an immaterial issue.

The Court: It seems elementary, a witness, laying aside this testimony and using a hypothetical case, a witness might say he saw an individual in a certain period, on cross examination it would be relevant for them to show that he said he saw the individual several times solely and wholly for the purpose of testing the witness's recollection in matters of that kind, going to the weight to be given the testimony.

Mr. Kelley: I would say, your Honor, that would be true if his seeing that person had any material relationship to the issues in the case, but how many times he saw the FBI Agent has nothing to do with his testimony.

The Court: That is a question for the Jury, so, if there is no objection other than the one you have mentioned, why, the matter may be received in evidence, whatever it was, was it offered by an exhibit number or page number?

Mr. Kelley: It is Exhibit R which consists of pages nine, ten, and 11 as we have marked the document submitted to the defense under 3500.

[fol. 904] Mr. Witt: Mr. Kelley I think is mistaken in what he just said. May I talk to him for a moment off the record and we won't waste time on it I am sure?

Mr. Kelley: I did misspeak. It is only page nine.

The Court: It has been marked as an exhibit or by a page number?

Mr. Kelley: Exhibit R.

Mr. Witt: I will make it clear now.

The Court: What you are offering is what now?

Mr. Witt: Defendant's Exhibit R which has been marked for identification and which is our page number nine.

The Court: Page number nine is what is involved, and that will be admitted in evidence.

(Defendant's Exhibit R for identification received in evidence.)

Mr. Witt: May I have your Honor's permission to read it to the Jury?

The Court: Yes, you may read it to the Jury.

Mr. Witt: May Mr. Deikman read it to the Jury and I can sit down?

The Court: Yes, he may.

Mr. Deikman: On the upper lefthand part of the page is the designation "SAC WYLY SA Zoeller, August 10, 1953. William Mason orally advised on August 7, 1953, that his fight with the Travis machine in Mine-Mill was apparently breaking into the open. He stated that Travis had settled the Union's dispute with A. S. and R. for eight and a half cents per hour and had also, without checking with the other sections of the Union, extended the contract to 1956.

"Informant said that Travis, feeling quite pleased with [fol. 905] himself over this, had erroneously interpreted a proposal made to the Anaconda Copper Mining Company as amounting to only six cents an hour and had severely criticized the Executive Board members for District No. 1 and the Montana locals. Informant said that in fact the proposal to the A. C. M. Company was much greater than eight and a half cents per hour.

"As a result, the Montana members were very upset with the International officers and were demanding to know what was going on. Travis realizing his error flew in from Denver and had a conference with William Mason and John Clark. Travis urged that there be no interunion split and that the Union should present a united front to the various companies.

"William Mason really told Travis off including charges of Communism on the part of Travis.

"Travis, calling a meeting of the Union's Wage Policy Committee in Denver for August 10, 1953, urged William Mason to come early to the meeting to meet with him, noting that they could settle their differences. To counter this move on the part of Travis, Mason has called a meeting of the Anaconda Wage Council for Denver on the same date. Informant said that the open fight is becoming greater every day and this is the beginning of a definite anti-Travis move, at least on the part of the Montana locals.

"Informant stated that he would contact the writer upon his return from Denver."

Q. Now, Mr. Mason, you just heard Mr. Deikman reading from this document that according to Agent Zoeller's report you told him, Agent Zoeller, on August 7, 1953, that you "really told Travis off including charges of Communism on the part of Travis." Do you recall saying that to Agent Zoeller in August of '53?

A. I don't recall saying anything like that. I recall it was a conversation with him concerning the situation in the Union. I do not regard that conversation as giving information on Travis as to the question whether he is a Communist or not.

Q. Do you recall that you told Agent—

[fol. 906] The Court: May I inquire, what is the purpose of this with respect to the simple fact that he had this discussion, not with respect to what was said or done? The witness testified in response to your question a while ago that as to the occasions upon which he had given statements or information, rather, relative to Mr. Travis, he continued and said in other discussions about other matters Travis's name had been mentioned. The Jury have to determine in what category this statement comes. It speaks for itself, and the only purpose was to show that there was such a statement given on the date indicated. I do not know that the subject matter is important. It is in evidence and it speaks for itself.

Mr. Witt: I am now going off on another line. I cannot be expected to make a speech every time I go off on a line saying what I am going to seek to prove. Obviously, I should not be required to do it. This is a preliminary question on another line, and, if your Honor wants me to indicate what the line is, I do not want to do it in open court in front of the witness, and I think it would be improper in front of the Jury.

The Court: Well, I think we had better leave that, and you can mention it to the Court in Chambers.

Mr. Witt: This is a very long line, and this problem of having to revise the course of cross examination I have prepared makes it extraordinarily difficult for me to do this job. I would be very happy to come back early if your Honor would consider it and it would not be an imposition

on the Jury so that we could dispose of this problem if we recess now.

In Chambers

Colloquy Between Court and Counsel

* * * * * * *

[fol. 911] The Court: I thought we could point this thing up more specifically. From the trend the discussion has taken I expect the only thing I can see to do is to proceed in the courtroom and just take the thing as it comes and rule on it as it is, but I think there ought to be some fundamentals that we give consideration to. Mr. Witt is a very [fol. 912] experienced cross-examiner, that is obvious, and the Court has no desire whatsoever to in any way hamper or interfere with his own method of proceeding with his cross examination, but I apprehend a very basic rule that must be observed in this in substance: that if a question on its face is relevant and an objection is made on the grounds of irrelevancy, the Court can pass on the matter right on the face of the question. If the relevancy isn't apparent, then the counsel who propounded the question has the burden of explaining why it is relevant or, if it is a preliminary question or something of that sort so that the Court may rule with respect to the objection with respect to irrelevancy. The Court cannot sitting up on the Bench fathom the thinking in counsel's mind that he has in view of some question. The objection is made on the grounds it is irrelevant, and the Court is immediately faced with the problem, there is nothing on the face of the question to show relevancy. So, I think there is no escape from then inquiring, "Why is it relevant," because otherwise, the Court could not pass on the thing.

Mr. Witt: Absolutely, your Honor. I am glad your Honor said that, and I think it may help us during the rest of the trial. I tried to raise this very problem this morning, and it is a problem that I have had with your Honor in my cross examination from the beginning. First, may I just say this in passing, and, again, this particular situation with Mason illustrates this, your Honor, that unlike the normal criminal case where you are dealing usually with

a physical event, robbery and narcotics and the rest of it, the line of cross examination by defense counsel is apparent to everybody usually. There are exceptions. In this kind of a case with these peculiar circumstances that we have, your Honor, it is not the same situation, so, I have no dispute with what your Honor just said. Quite the contrary. I have been hoping there would be more opportunity for us to be able to answer your Honor's question as to the relevancy of a particular question.

Now, in that connection there is a physical difficulty in this courtroom that I remembered we had at the beginning of the trial before Judge Breitenstein because of the setup. As I tried to say this morning, your Honor, and I protested about it, there is the difficulty of approaching the Bench, especially since these matters are so often this complicated, and trying to explain to your Honor without being overheard by the Jury and the witness.

[fol. 913] The Court: My own feeling about approaching the Bench business, there are plenty of occasions when it is helpful, but it doesn't take the place of any objections or anything else. There are some times there is something comes up about identification of an instrument or showing me what is going to be read that it is proper, but you can bear in mind that nothing that is said at Bench conferences gets in the record at all, and the net result is that the thing is meaningless. There ought to be something that is in the record. There are plenty of occasions when it is helpful, I grant that.

The second thing that is so obvious, but I think it should be mentioned in connection with your statement about what you expect to show by this witness, that the basic restraint on that is something that is within the field of the direct examination or the secondary field of something that relates to the credibility of the witness. It is admissible on that basis, some extraneous thing that would reflect on credibility. That must be borne in mind.

Then, one thing, for instance, getting to the point where we stopped, apparently, as I understand from your statement here, that you wish to offer something on the theory that is in contradiction with some of his testimony on direct in this case. Now, I never in the world associated it

with that from the form of the question or anything else. I would think in those kinds of cases the first thing to do would be to call the witness's attention to what he testified in this case, I mean when you start on a new field, something that has been testified to, and then call attention to whatever you think is contradictory or inconsistent or whatever it may be with that. Then, of course, the procedure is obvious, and the question then, of course, would be whether the matter is in contradiction, but I do not know that we can make any specific rulings or arrangements here about the thing at all.

Mr. Witt: On that last point, your Honor, I think, if I follow you, that is an impossible assignment for me. You take this very problem, how can I lay a foundation by trying to summarize his testimony both on direct and cross with respect to these matters particularly? May I say this, I had forgotten, of course, through all of this goes the issue of credibility. In view of his answers about his talks with the FBI, which quite astonish me, I think I am entitled to show the whole course of the history with the FBI. [fol. 914] The Court: I do not know what you mean by that, of course, and I do not quite follow that that question would arise on a specific question. If you mean, I don't know exactly what you do mean.

Mr. Witt: May I say it in a word? I am still not sure that I follow his answers, but he has been saying he doesn't remember these other occasions when he talked to the FBI. Now, I want to go back to his whole history as to when he actually did first talk to the FBI. We are not bound by the earlier statement and the statement furnished to us.

The Court: What you said just now is perfectly proper, I think, as I have pointed out at the very beginning here, and that is the theory I have been letting these questions be answered with respect to, "You talked to him on such and such a day," because he has fixed the time as to when he did talk to them, and anything that you might say is inconsistent with that, or, not consistent with it is probably a better way to say it, might reflect on his recollection or something of that sort, but I would not attempt to say what the question was that this matter arose over, but I

venture to say, and, if you want to look at the record, there was nothing in the question to suggest that was the purpose at all.

If you are attempting to show that the statement he made, it wasn't admitted on that basis I guess we all agree, is contradictory with any of his direct testimony in any of his testimony here in this trial, of course, it could be considered for that secondary purpose of contradiction or inconsistency. There is nothing up to date to show anything. If that is what you are aiming at, I didn't know.

Mr. Witt: Again, with this particular question about this sentence in that document, then, if that is permitted and he answers that, then I will get to the Leggat Hotel conversation, and I want to ask him whether he didn't discuss his plans to meet Travis before he actually did meet Travis, so, I will show that he had a discussion earlier than this one on August 7 about Travis, and I also, as I have already indicated, want to try to show that before he called Travis on the long-distance telephone late in July [fol. 915] that he discussed that with the FBI. So, all that would contradict—

The Court: Where has he testified to anything inconsistent with that in the trial?

Mr. Vincent: I cannot see the relevancy of it.

The Court: I cannot see on the face of that statement the relevancy. The relevancy is what I do not see.

Mr. Vincent: Might I say also in regard to Mr. Witt saying he wants to go back to the first time that this witness talked to the FBI, I might ask Mr. Witt in relation to what?

Mr. Witt: About Travis.

The Court: I think he has already been into that two or three times.

Mr. Witt: But I am entitled to make the whole record. I have already contradicted him. He said he gave this signed statement of his own, the only one he remembers to the FBI.

The Court: I think that is water under the bridge. You have asked him a number of times, again, if my memory is correct, with respect to when he talked to them and so forth, and on his own admission he was mistaken on the

date he gave in the first instance and fixed this other date.

Mr. Witt: I want to show his answer, that his memory is incredible, I want to show he is lying.

The Court: I don't believe we are getting anywhere with this discussion. I think we had better go ahead just probably on the question and answer basis, because I mean it is not like a situation where we have one problem and you can say, "Well, you can answer this question or you asked this question," but this involves numerous things.

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[fol. 919] Afternoon Session

WILLIAM MASON, resumed the stand, and testified as follows:

Cross examination.

By Mr. Witt (Continued):

Mr. Witt: Your Honor, we have given further thought to the pending question which we discussed in Chambers during the recess to which there is a pending objection by the prosecution. Will your Honor rule on that objection now so we will know how to proceed?

The Court: Well, I think I will sustain the objection to that question on the basis of form as I recall it. If you wish the record read, you may do it. I am not exactly sure as to the form of the question. I know the general problem, but I think I will sustain the objection and you may proceed.

Mr. Witt: May I have it read if it is not too difficult for Miss Marson, and then maybe I can rephrase it?

[fol. 920] The Court: You may proceed, and I will rule on the question now if there is an objection, it it is along the same line. I do not recall specifically the question.

Q. Mr. Mason, do you recall that in the conversation with Special Agent Zoeller on August 7, 1953, that you told him that you had "told Travis off including charges of Communism on the part of Travis"?

The Court: I think the witness was permitted to answer that question and gave an answer along the line that he

didn't recall or something to that effect. Is that counsel's recollection?

Mr. Kelley: I believe that it is substantially right, your Honor.

Mr. Witt: May we ask the witness again?

The Court: I think, Miss Marson, we will wait and get the end of this thing. I think he answered that question already.

(The reporter read the question and answer, as follows: "Question: Now, Mr. Mason, you just heard from Mr. Deikman's reading of this document that according to Agent Zoeller's report you told him, Agent Zoeller, on August 7, 1953, that you 'really told Travis off including charges of Communism on the part of Travis.' Do you recall saying that to Agent Zoeller in August of '53? Answer: I don't recall saying anything like that. I recall it was a conversation with him concerning the situation in the Union. I do not regard that conversation as giving information on Travis as to the question whether he is a Communist or not.")

Mr. Witt: I am sorry. I apparently was mistaken.

Q. Do you remember telling Agent Zoeller or any other agent of the FBI in Butte about the conversation you had had with Travis in the Bar of the Leggat Hotel in Butte?

A. Yes. However, I don't remember when.

Q. Will you tell us again what was the date of that conversation in the Leggat bar according to your best recollection?

A. Well, of course, the conversation was in 1953.

Q. When in '53, Mr. Mason?

[fol. 920a] A. I think it would be in the latter part of July. Right at the moment I cannot say for sure, but the impression in my mind at this moment is it was in the latter part of July.

Q. Now, in view of that answer, Mr. Mason, that the conversation with Travis at the Leggat Hotel was the latter part of July, I will ask you to look at Defendant's Exhibit R again, that is in evidence now, if the Court please, page nine was read in by Mr. Deikman, the sentence I

asked you about this morning and whether that doesn't refresh your recollection that it was on August 7 that you told Agent Zoeller about the conversation.

The Court: That wasn't your question. Your question was, when was the conversation with Mr. Travis, wasn't it?

Mr. Witt: No, I am done with that. He has answered that. Now, I want to ask him whether his recollection is refreshed now that he has said this conversation with Mr. Travis was late in July, that it was on August 7 that he told Agent Zoeller about that conversation, and that is what this sentence refers to.

The Court: If there is any contradiction in that statement which is in evidence, it is before the Jury, and what is the purpose?

Mr. Witt: It is not a contradiction, your Honor. It is in terms of the purpose of this that I tried to explain to your Honor in Chambers, I want to show that he did report on all of these developments to the FBI.

The Court: He just said he did.

Mr. Witt: Well, no, but he didn't recall when it was when I asked him earlier.

The Court: I didn't understand the question then.

Mr. Witt: Let me ask him again if I may. I think it will save a little time. I am asking him now to look at that document relating to his conversation with Mr. Zoeller.

The Court: That is already in evidence.

[fol. 921] Mr. Witt: I am using it to refresh his recollection.

The Court: What?

Mr. Witt: I am using it to refresh his recollection.

The Court: All right.

A. I don't remember of a detailed discussion that took place years ago. This is an old document. I haven't seen this before.

Q. Mr. Mason, I didn't ask you that about the details. I am simply asking you whether your recollection is now refreshed looking at that document that it was on August 7 that you told Agent Zoeller about your conversation with Travis in the Leggat Hotel Bar late in July.

A. Refreshed as to date or content?

Q. As to date that you told Agent Zoeller.

A. No, I don't remember the incident with respect to date or detailed conversation.

Q. Now, Mr. Mason, with reference to your testimony last week on direct examination about the telephone call you made to Travis from Butte to Denver in July of 1953 I will ask you whether before you made that telephone call you told an Agent or Agents of the FBI that you were going to make that telephone call.

Mr. Vincent: The Government objects to that, your Honor, as being irrelevant.

The Court; What is the relevancy?

Mr. Witt: Well, your Honor, I thought it was in order to avoid this discussion in open court that we had discussion in Chambers. The relevancy is based on what I stated to the Court in Chambers during the recess.

The Court: I don't recall that in Chambers we agreed upon any specific line of examination or anything else.

Mr. Witt: No.

[fol. 922] The Court: And I think I indicated then that I was going to ask counsel what the relevancy of the question is.

Mr. Witt: I wasn't trying to say that we agreed. All I was trying to say is that I advised your Honor and Mr. Kelley as to what the purpose of this line was. If your Honor wants me now to point that out again, I will be glad to do so, but I wonder whether we should do it in open court.

Mr. Kelley: May it please the Court, it seems to me that the question on its face shows that it is irrelevant and there is no point in arguing it.

The Court: I think I will sustain the objection.

Mr. Witt: I am satisfied with the record I made in Chambers on this, your Honor.

The Court: All right.

Q. At any time before August 7, 1953, did you furnish any information to the FBI about Travis?

Mr. Kelley: May it please the Court, it has been asked and answered.

Mr. Witt: No, I don't think it has in that form. Again, I refer to the conference in Chambers.

Mr. Kelley: May it please the Court, it is merely changing the form. It is the subject matter that he is going into again. He asked him when he first made his report and how many he had made and all of that.

Mr. Witt: No, it could be at the beginning in order to lay a foundation for it I asked him generally.

The Court: I mean is this question—read the question, please, Miss Marson.

(The reporter read the last question.)

The Court: The objection will be sustained on the basis that the question has been answered several times.

[fol. 923] Q. In August of 1953, on August 7, 1953, were you an informant for the FBI?

Mr. Kelley: May it please the Court, the Government objects to that as calling for a legal conclusion of the witness.

The Court: The Court will sustain the objection.

Q. Mr. Mason, at any time before August 7, 1953, did you receive any payments from the FBI for furnishing information to the FBI?

A. Definitely not.

Q. At any time after August, 1953, until you left Mine-Mill, Mr. Mason, did you receive any payments from the FBI for furnishing information about Travis or Mine-Mill?

A. No. I am opposed to anyone receiving payment for services to his country, and I think cooperation with the FBI in these matters is a service to my country.

Q. In August, 1953, you were still Executive Board member of District 1 of Mine-Mill?

A. Yes.

Q. Did you advise any official of Mine-Mill or any member of Mine-Mill in August, 1953, at the time you were Executive Board member that you were furnishing information to the FBI about the negotiations that Mine-Mill was then carrying on with the employers?

Mr. Kelley: I thought that question started out to be something else.

The Court: There is no objection? Then, you may answer, Mr. Mason.

A. I am not sure I understand the question.

The Court: You can have it read. Do you wish to have it read?

The Witness: Please.

The Court: All right.

(The reporter read the last question.)

Mr. Kelley: Well, the question was what I thought it was [fol. 924] going to be. I lost it somewhere. I do object on the ground it is irrelevant.

The Court: I will sustain the objection as to the form of the question. I do not see the relevancy limited as the question is to that matter.

Mr. Witt: May I try to point out the relevancy as I see it, your Honor?

The Court: It is to the form of the question, is the basis of the objection.

Mr. Witt: Mr. Kelley and the Court have pointed out why the question is objectionable in form. If Mr. Kelley objects, I will be glad to try to restate it.

The Court: You can restate the question if you wish to try again.

Q. Mr. Mason, in view of your testimony a moment ago that you were furnishing information to the FBI as a patriotic service did you in August, 1953, advise or tell any official of Mine-Mill or any member of Mine-Mill that you were performing a patriotic service by reporting to the FBI Mine-Mill's negotiations with employers and the fight you were carrying on within the Union on that problem?

Mr. Kelley: May it please the Court, we object to it as to form.

The Court: I will sustain the objection.

Q. Mr. Mason, do you recall any time in August, 19— strike that, please, Miss Marson. Mr. Mason, in August, 1953, was there a Wage Policy Committee meeting of Mine-Mill here in Denver?

A. Yes, sir, I believe there was.

Q. That was after the conversation you had had with Travis in the Leggat Bar, is that right?

A. Yes. I am not sure what type of a meeting it was. To the best of my recollection it was a meeting having to do with bargaining that year.

Q. Did you say you don't remember what kind of a meeting this was in Denver?

Mr. Kelley: He stated what kind it was.

[fol. 925] Mr. Witt: I do not want Mr. Kelley to testify.

The Court: He has answered. He didn't say what you attributed to him.

Mr. Witt: All right. Will you read the answer, Miss Marson?

(The reporter read the last answer.)

Q. Well, Mr. Mason, do you recall testifying under direct examination last week on January 23, page 1035, when Mr. Crandall was beginning to ask you about your conversation with Travis which began at the Sears Hotel where you said you met Travis, and I quote from the witness's answer: "Well, it was immediately after the Wage Policy Conference in Denver, perhaps a session or two of the Executive Board." You remember that?

A. Yes.

Q. So, it was a Wage Policy Conference, is that right?

A. Yes, but often these meetings were more of a get-together of what we call the Spear Holders, and sometimes it was very difficult to distinguish whether it was a meeting of the rank and file representatives on bargaining or whether it was a rally of the Communists within the Union. That is why I hesitated in pinning it down to exactly a formal wage policy meeting. I think the meeting was packed. But it was a wage policy meeting.

Q. Do you recall that when you talked to Mr. Zoeller in Butte on August 7 you told him that Travis had called a meeting of the Union's Wage Policy Committee in Denver for August 10?

A. I don't recall it. I very likely did.

Q. Well, since you seem to have a little doubt, I will show you.

The Court: That is in evidence, Mr. Witt. This is just argument with the witness. If there is anything contradictory there, it is already in evidence.

Mr. Witt: The witness qualifies his answer.

The Court: What is the difference, because I guess both of you agree it was the time the conversation was held, and what you label the meeting, he has explained his designation of it.

Mr. Witt: I have a different purpose in mind as I ex- [fol. 926] plained in Chambers. I won't do it again in open court. Would you please read the last question and answer?

(The reporter read the last question and answer.)

Q. Isn't it true then, Mr. Mason, according to your present recollection that when you talked to Mr. Zoeller on August 7 you not only told him about the Leggat Hotel conference in Butte with Travis late in July but you also told him that there would be a meeting of the Wage Policy Committee in Denver on August 10?

Mr. Kelley: May it please the Court, that matter has all been gone into, and it is in evidence.

The Court: I will sustain the objection.

Q. Do you recall that on August 7, 1953, you told Mr. Zoeller that you would contact him upon your return in Denver from the Wage Policy Committee meeting?

Mr. Kelley: May it please the Court, that is irrelevant.

The Court: The objection is sustained.

Mr. Witt: That is for the purpose, all this is for the purposes I explained in Chambers. I am merely making the record.

The Court: Very well, the objection is sustained. The statement you have has all been received in evidence, and it stands and speaks for itself. Any matter in it may be referred to. There is no purpose for this examination as the Court sees it. That is the reason for sustaining the objection.

Mr. Witt: I think I understand your Honor, but, as I explained in Chambers, I want to refer to this material in a preliminary way to go into something else.

The Court: The objection will be sustained.
Mr. Witt: All right, sir, I understand.

Q. Mr. Mason, do you remember a second occasion in August of 1953 when you talked to an agent or agents of [fol. 927] the FBI in Butte about Travis?

A. I don't remember talking to an agent of the FBI about Travis as an individual at any time except on the occasion of signing a statement which was an account of an interview with them, and the subject was Travis and his activities, his conversations with me and so on. The rest of the conversation with the FBI that I recall was on the question of the Union, the control of the Union by Communists, my own position in the Union, fighting them, and things that I regard as not having to do with Travis as an individual but Travis as the boss of the group that I was in opposition to.

(Document marked Defendant's Exhibit S for identification.)

Q. Mr. Mason, I now show you Defendant's Exhibit S for identification consisting of two pages being our pages ten and 11, the first page of which bears the date August 18, 1953. I will ask you to read those two pages or as much of them as you want and ask you whether that doesn't refresh your recollection that on August 15 you talked to the SAC in Butte or some other agent in Butte about Travis.

A. I think I answered this question before. I remember talking to the representatives of the FBI. I can't recall in detail the conversation nor am I responsible for necessarily the language contained on that page. That is the first time I saw it. I will, however, assume responsibility for the statement that I signed which I read carefully which I know are things that I said.

Mr. Witt: At this time, I will offer in evidence Defendant's Exhibit S for identification.

Mr. Kelley: May it please the Court, as to Exhibit S it is the Government's position that there hasn't been sufficient foundation laid to show that this is a statement of the witness which he has adopted in anywise. Part of it is

irrelevant, but, and, we feel it might encumber the record in the court. However, as to the content we have no objection to it.

The Court: Well, as I have indicated before, I have ruled on the question, the first part of your objection, it has been the position of the Court that the Government furnished these statements as being statements within the meaning of Section 3500, Title 18, U. S. C., and the Court has accepted them as coming within that category. So, the first [fol. 928] part of your motion will be overruled. I understand you have no objection otherwise, is that right?

Mr. Kelley: Well, except that it unnecessarily encumbers the record.

The Court: Well, I don't quite get the significance of that.

Mr. Witt: I take it Mr. Kelley means that all cross examination encumbers the record.

Mr. Kelley: I don't mean that at all, Mr. Witt.

The Court: I do not think that is called for either.

Mr. Kelley: It is just cumulative.

The Court: This record is long enough now, and just a page or two won't make any difference. The objection will be overruled.

(Defendant's Exhibit S for identification received in evidence.)

Mr. Witt: May I ask permission to have Mr. Deikman read this to the jury?

The Court: All right.

Mr. Deikman: This reads, "Director, FBI, SAC, Butte, August 18, 1953. William Mason orally furnished the following information on August 15, 1953:

"Maurice Travis, National Secretary, International Union of Mine, Mill & Smelter Workers, settled the Union's contract dispute with the American Smelting & Refining Company for eight cents an hour and also extended the contract for two years. Travis then heard of a counter proposal made to the Anaconda Copper Mining Company in Montana which proposal Travis interpreted to be six cents per hour. Mr. Mason says that the proposal 'which is tricky and difficult to understand,' actually amounts to two

and one-half cents times the eight cents per hour that Travis settled for. Travis thereupon sent a wire to locals all over the country accusing the Montana group of selling [fol. 929] out the Union. Upon hearing of this, Mason telephonically contacted Travis and accused him 'and his Communist gang' of being so anxious to 'get the Montana opposition' that he had slandered the Montana group and had also violated a longstanding Union policy of not extending contracts for more than one year.

"Travis then came by air to Montana and Mason told Travis that the 'fight was really on' and that the fight was going to be on the Communist issue. Travis then called a meeting of the Union's National Negotiating Committee in Denver for the week of August 9, 1953.

"During the Denver meeting, Mason again 'accused the Communist gang' of having gone too far in their efforts to get the Montana opposition out of the Union. Travis, although stating that he and Mason would iron out their differences, was at the same time pointing out that a fight was futile, because he, Travis, had the votes and the control.

"Informant as of August 15, 1953, was not certain what his course of action was going to be, but he states that he feels to compromise now would never work as Travis and his machine would eventually 'get him.' He states that he knows that the Montana group will get a charter from either Walter Reuther of the CIO or John L. Lewis of the United Mine Workers and is seriously considering contacting one or both of these individuals with the view of having the Montana section secede from Mine-Mill. In the meantime he intends to organize the Montana locals into what he calls 'a vicious fight on the Communist issue.'" There is deleted material and then following, "The above is submitted for the information of the Bureau and the Denver Office."

Q. Mr. Mason, going back to your telephone call to Travis in July, 1953, did any agent of the FBI or any other agent of the Government advise you before you placed that telephone call to Travis that arrangements would be made to have that telephone conversation tapped by a mechanical device?

Mr. Kelley: The Government objects to that as irrelevant and immaterial.

The Court: I think I will let him answer the question. [fol. 930] You can answer the question.

A. The telephone call to Travis was as a result of extreme anger on my part at the dirty tactics that Travis and the Communists were employing against me and was not as a result of any previous discussion with anyone but especially not with the FBI. I resent what I think is an effort to smear my reputation after this trial is over.

Q. During the luncheon recess, Mr. Mason, did one of the prosecutors advise you that the question of your reputation after this trial is over was discussed in Chambers with the Court?

A. No. I know this from my long experience with Communists within the Mine, Mill & Smelter Workers, personal difficult experience. I know this is a result of the original trial of Travis when reports were sent from the Union Headquarters here in Denver to the field making me out a liar and everything else on the witness stand. I am sorry, your Honor, if I have some feelings on this question.

The Court: All right.

Q. During the luncheon recess did any of the prosecutors or Mr. DeCook suggest to you that you display some indignation on the witness stand about my questioning?

A. Of course not. They did, however, tell me during the recess this morning, Mr. Crandall told me that it is the witness's privilege to explain his answer at times. He also admonished me to speak louder so that the Jury and everyone can distinctly hear.

Q. In this conversation you had with Travis, telephone conversation you had with Travis in July of '53 you told him that you had been invited to testify against him, didn't you?

A. Yes, I did.

Q. Who invited you to testify against him?

A. Representatives—

Mr. Kelley: That is a side issue and collateral and irrelevant to the matter.

The Court: Well, I think I will let him answer the question. You may answer, Mr. Mason.

A. The invitation was in the form of a question, would I testify against Communists in Mine-Mill including Travis. [fol. 931] I said by way of an answer that, "I think I can do better fighting Communists where I am within the labor movement than from a witness chair." I still incidentally believe I am more effective in the other field.

Mr. Witt: I do not think you answered my question, Mr. Mason.

The Court: I think he did. You can have the question read.

(The reporter read the question, as follows: "Who invited you to testify against him? Answer: Representatives—")

Q. I will ask you again just to save a little time, who was it that asked you to testify against Travis?

A. Tom Zoeller and the only person that I know within the FBI that I have had more than one conversation with.

Q. And when was it that Tom Zoeller asked you to testify against Travis?

A. Sometime before this conversation with Travis over the telephone. I cannot recall the date.

Q. Was it a very short time, a few days or a few weeks or a few months?

A. I cannot recall. I know it was before the conversation with Travis by telephone.

Q. At that time you had known Tom Zoeller for a long time, hadn't you?

A. No, I did not.

Mr. Kelley: May it please the Court—

The Court: He has answered the question.

Q. On the occasion when Mr. Zoeller asked you to testify against Travis did he ask you first whether there was testimony you could give against Travis?

Mr. Kelley: May it please the Court, I think he has pursued this far enough.

The Court: I will sustain the objection.

Q. Any time before Mr. Zoeller asked you to testify against Travis and since you first got to know Mr. Zoeller

before July, 1953, had you given him information about Travis?

[fol. 932] Mr. Kelley: May it please the Court, it has already been asked and answered.

The Court: I will sustain the objection.

(Document marked Defendant's Exhibit T for identification.)

Q. Mr. Mason, I show you Defendant's Exhibit T for identification which consists of several pages beginning on our page 18. I will ask you to look at it and tell us whether you recognize what that document is. Mr. Mason, that consists of 11 pages.

A. I believe I know what it is.

Q. Will you tell us what that is?

A. I was looking for my signature, but it is the only statement that I signed for the FBI. It has to do with the general situation within the Union mostly as discussed between Travis and myself.

Q. Is that a copy of the statement that you referred to this morning when you said that you gave the FBI one statement that you yourself had prepared in 1955?

Mr. Kelley: That is a misstatement of the record. He didn't say he had prepared it himself. He said they prepared it.

Mr. Witt: I apologize. The witness said he talked with the FBI and then it was prepared in the FBI office and shown to him and he signed it.

Q. Is that the one you talked about this morning?

A. Yes. I looked for the signature and didn't find it.

Mr. Kelley: I think it is on page 11.

Mr. Witt: Our page 11?

Mr. Kelley: Page 11 of the document.

Q. Will you look at that and see whether that is your signature?

A. Yes.

Q. And that also refreshes your recollection that the statement is dated April 12, 1955?

Mr. Kelley: It speaks for itself, the document.

[fol. 933] Mr. Witt: I am not offering it. I want to get the date out of the way so I can go to something else.

Mr. Kelley: We will stipulate that the document shows that it was dated April 12, 1955.

Mr. Witt: All right.

Q. At any other time in 1955, Mr. Mason, do you remember talking to Mr. Zoeller and giving him information about Travis?

Mr. Kelley: May it please the Court, the witness has answered the question. If counsel has documents that he is specifically referring to—

The Court: I will sustain the objection. I think the witness has answered the question a number of times.

Mr. Witt: Not in this specific form, your Honor, but I will show them to the witness, and maybe we can get the remainder of these I am interested in at once. If the Court will give me a minute with Mr. Kelley, I will show him what I have in mind. We perhaps can save a little time.

The Court: All right.

Mr. Kelley: I think you had better go ahead in fairness to the witness.

Mr. Witt: I will have to ask him a preliminary question if we cannot stipulate in view of what Mr. Kelley said.

Mr. Kelley: I have got to be fair to the witness.

Mr. Witt: I want to be fair to the witness too. All I am interested in is the proof the same as you are.

The Court: Ask him the question.

Q. Do you remember any other occasions in 1955 when you gave Tom Zoeller information about Travis aside from the statement you signed April 12?

The Court: I will sustain the objection.

[fol. 934] Mr. Witt: I thought Mr. Kelley said we could go ahead.

The Court: He has testified. You don't need to go into it every time you propound a question. He has testified what information he gave with respect to Mr. Travis and

testified he had other interviews in which Mr. Travis's name might have been mentioned. He has answered the question two or three times.

Mr. Witt: At this time, if the Court please, I offer in evidence—I don't think it has to be marked, your Honor, in view of our understanding and agreement that we can offer any of this furnished by the Government at any time.

The Court: Yes, you can offer it at any time.

Mr. Witt: Yes, any parts of it we think are relevant. I now offer from our page 29—

The Court: You had better interrogate. I do not know what it is. You had better ask the witness if it is about a meeting, whether they had the meeting, because he is entitled for his own information to see the thing and to give his version of it. It may be admissible in evidence.

Mr. Witt: May I have it marked?

(Document marked Defendant's Exhibit U for identification.)

The Court: You can ask him whatever you wish.

Mr. Witt: I am interested in having two reports marked, and then we can perhaps save time.

The Court: All right.

Q. Mr. Mason, I will ask you to look at Defendant's Exhibit U for identification consisting of three pages beginning on our page 29 and ask you whether that doesn't refresh your recollection that you talked to Mr. Zoeller on April 13, 1955, which date I am pointing out to you appears on the second of these three pages.

A. I remember the conversation, not in detail, however.

Q. Mr. Mason, were you born in this country?

A. No, sir.

[fol. 935] Mr. Vincent: If your Honor please, the Government objects to that.

The Court: I will sustain the objection.

Mr. Witt: I would like to be heard on that, your Honor.

The Court: I think I will let him answer the question, and you may answer, Mr. Mason.

A. No.

Q. Where were you born?

A. I was born in Europe.

Q. What country?

A. In Yugoslavia.

Q. When did you come to this country?

A. Nineteen twenty-three.

Q. And were you thereafter naturalized as an American citizen?

A. Yes.

Q. Now, on direct examination I think you testified that you had been a member of the Communist Party for a previous period in the 1930's. Do you remember that testimony of yours?

A. Yes.

Q. Did (sic) you tell us more exactly when you joined the Communist Party and when you left the Communist Party?

A. I cannot. I was quite young. At that time the period is quite obscure to me.

Q. At any time after you had been a member of the Communist Party were you interrogated about that by the Immigration Service?

Mr. Kelley: May it please the Court, that is irrelevant whether he was or not. It doesn't go to his credibility. It is not part, was not part of his direct examination. It is wholly collateral.

The Court: I will sustain the objection. If there is any specific matter you wish to ask him about, you may do so.

Mr. Witt: I think we made a sufficient record in Chambers on this your Honor. I will proceed to ask my questions and, then your Honor will make his rulings if Mr. Kelley objects, and we will save time I think that way.

The Court: All right.

[fol. 936] Q. Mr. Mason, do you recall that on September 3, 1938, you were interrogated in Helena, Montana, by Harold Wetherer, Immigrant Inspector, about your membership in the Communist Party in the early '30's?

A. I recall being asked some questions. However, I do not recall the time nor do I recall at all that such questions were asked in Helena. I believe they were asked in Butte.

Q. I am coming to that, Mr. Mason, but since you mention that, maybe we will get that out of the way. On this occasion in Butte which you recall, was that on February 12, 1952, when you were interrogated by Officer-in-Charge Keifer L. Gray and you were asked questions about—

The Court: Ask him, read him the question you have in mind and ask him if he made that answer, not your synopsis of what he is testifying about.

Mr. Witt: I am just asking him, no synopsis, this is a long thing. I just asked him about the membership in the Communist Party which I can ask him about.

The Court: That is your assumption. I do not know the purpose. You can ask him any specific question and then whether he made that answer, and then we will determine whether the thing is properly admissible.

Q. Do you recall, Mr. Mason, being asked by Mr. Gray in Butte, Montana, on February 12, 1952, the following question: "Approximately when and where did you join the Communist Party?" And giving the following answer: "It was in the crash of 1929, possibly 1930. I have difficulty remembering dates. I know I joined the Miners Union, and I have some difficulty in even recalling the type of organization I actually joined."

Mr. Vincent: If the Court please, the Government objects to that.

The Court: I do not think the question need be answered until we get this disposed of. There is nothing inconsistent in that as I understand the testimony now. What is the purpose of that?

Mr. Witt: I thought we had made it clear in Chambers, apparently we didn't, and I have difficulty continuing this [fol. 937] examination, and I think it is very confusing for the Jury. May I suggest that we take a short recess and go into Chambers? I will try, if you will just bear with me or go into Chambers without a recess, I will try to explain to the Court the purpose of the rest of my examination of this witness.

The Court: I am not asking about that. I am asking about the relevancy of this question and for what purpose it is offered.

Mr. Witt: Well, I do not think I should answer that question in the hearing of the witness. I respectfully request then that the witness be excused, be asked to step out of the courtroom, because, if I answer that question, I am being required to tell the witness what I am interested in and preparing him to give his own answers.

In Chambers

The Court: What is it now, Mr. Witt?

Mr. Witt: What I am now trying to show by the witness is that in 1938 before he was naturalized he was interrogated by the Immigration Service about his past membership in the Communist Party, that is what I started on, and he said he didn't remember. That was the interrogation I referred to in Helena. Then with respect to the pending question I want to show that in February, 1952, he was interrogated again by the Immigration Service in Butte and gave a sworn statement on that occasion about his past membership in the Communist Party.

In addition, I want to show that the witness knew that Congress in 1950 between these two events, the one in '38 and the one in '52, the witness knew in 1950 Congress passed the McCarran Act which among other provisions had provisions providing for the deportation of aliens on the ground of their past membership in the Communist Party. That provision was sustained by the Supreme Court in Galvan vs. Press. I want to show also that the witness knows that the immigration laws provide for denaturalization of naturalized citizens who secured their naturalization by fraud and that the witness knows that there are cases, many of them receiving wide publicity, in which the Government is trying to show that, if an alien who at the time or in the past had been a member of the Communist Party gets [fol. 938] himself naturalized, then he is subject to denaturalization. The result of the witness's knowledge of this legal situation which he knew as a layman like many other laymen knew, the witness knew in February, 1952, on the occasion on which he was interrogated by the Immigration Service the second time that he was subject first to denaturalization and after that had been accomplished by the Government he was subject to deportation.

Then I want to show as a result of that situation and the promises and-or threats which were held out to him by Government Agents in connection with it that he thereafter after February 12, 1952, became an informant for the FBI and performed his functions as such at least into 1956 according to the record we have.

The Court: What do you think makes it relevant in this cross examination?

Mr. Witt: Well, my understanding is, I could be wrong, but I don't think I am, that on cross examination you can show the interest of the witness in testifying in the same way you can show that the Government has paid him cold cash, that is always relevant, I don't think there is any dispute about it, Mr. Kelley didn't even object to these questions about payments to him by the FBI, and we can show that the Government paid him in some other form, often as in this case something more valuable than cash.

The Court: What do you think about it, Mr. Kelley?

Mr. Kelley: May it please the Court, I think this falls squarely within that case that I read to you the other day about going into anything for the purpose of merely trying to embarrass a witness. It would be like going into his marital problems or something like that if he had them. This is not a deportation or a denaturalization case, and those issues might have some relevancy there. In both of these statements he has admitted belonging to the Communist Party, and, so, there is nothing inconsistent with his testimony on direct, and in these statements, and that is the purpose of using prior testimony, is to show an inconsistency with his testimony on direct.

[fol. 939] Now, Mr. Witt has also assumed because this Exhibit P, which is the 1938 testimony, says "investigation conducted by the Helena Office on September 2, 1938" that the investigation was conducted in Helena. The witness said he remembered it as being in Butte. So, he assumes immediately because it says by the Helena Office that the witness is mistaken about that. But in both of these statements he admitted he belonged to the Communist Party, and it is not inconsistent, and it is going off on a matter that is wholly collateral and only for the purpose of trying to embarrass the witness if anybody could come to the conclusion Mr. Witt has from these two documents.

It is a statement about his becoming an informer, and the Government holding this over his head, that is all a figment of his imagination. He cannot prove any of it. But he makes those statements for the record and proceeds.

The Court: I want to inquire about one thing. I am asking you as a member of the Bar of this Court and as a member of the Bar. You testified about threats and coercion. Is there any testimony that you know of that will substantiate that charge?

Mr. Witt: Yes, sir. Let me answer it this way: In the first place, I didn't testify, if the Court please.

The Court: No, you didn't testify, but you just stated in what you were talking about—

Mr. Witt: Let me tell you what I didn't say, I will be glad to as a member of the bar, and I am very conscious of that problem in conducting my examination. I know for a fact both as general counsel to Mine-Mill and from my talks with people in the union during all these years that during the period I am talking about, during the McCarran Act period and particularly during the period before the fight in the union began in August, 1953, which would be after February, 1952, Mr. Mason was going around asking people questions about his status as an alien.

I want to say for the record he never, your Honor, I just want to finish my statement in view of the way your Honor put the question, it is important for me to state for the [fol. 940] record that Mr. Mason never asked me about it either as general counsel for the Union just off the cuff or in any capacity as a lawyer, but I have been advised by several people in the union that Mason raised that question. So, that is why I am interested in pursuing it.

The Court: That only turns, that doesn't touch what I am asking. You in what you said you intended to establish left definitely the impression that some officer of the Government or some Agent of the Government had threatened him with deportation or with some denaturalization proceeding or refusal of his citizenship or something if he didn't go along in effect with this particular series of investigations and testify for the Government. Now, I wondered what that is based on.

Mr. Witt: That is based on these two aspects of it, your Honor, that I have tried to state: One, the circumstantial evidence from these—

The Court: That doesn't—I mean there is a reason you say there were threats and was a positive arrangement between officers of the Government that they would not denaturalize him in effect or proceed against him in respect to his citizenship if he would go along and testify for the Government in the cases. Is that based on implication or deduction or do you know of any fact to support it?

Mr. Witt: No, sir. Your Honor, so this record will be very clear on this point, I am aware of the rule that is binding on counsel. In fact, I discussed with Mr. Deikman and Mr. Travis at luncheon in this very connection about counsel's having to support a question which has to do with a witness's prior testimony. In other words, the illustration I gave to Mr. Travis in explaining this problem to him and explaining what has already happened in the trial was that you could not as a foundation question to the witness say to him, "Isn't it true that on such and such a date you gave such and such testimony," unless you as counsel knew he had, and you could exhibit it to him if he answered "no" for purposes of impeachment.

This kind of material is not in that category. I am not saying there is testimony, to use the word that is important here and the word that your Honor used in this question; what I am saying in the light of my initial statement here [fol. 941] on this problem is that the circumstantial evidence having to do with the dates, particularly the passage of the McCarran Act in 1950, this man's interrogation by the Immigration Service in 1952, the fact that the evidence in this case discloses that in August, 1953, if not earlier he was an informant for the FBI, that is circumstantial evidence which leads me to believe that it may be true that the Government used this kind of pressure on him plus the other thing I said that I had been advised that during the critical period in question Mr. Mason was very, very concerned with that problem.

The Court: I do not think the inference is warranted, the inference there were threats or there was any deal made or anything, however you wish to designate it in what you

have just stated, and except for that I am convinced that the evidence is entirely irrelevant. So, the Government I assume objects or did object.

Mr. Kelley: Yes, we did.

The Court: The objection of the Government to this line of testimony may be upheld.

Mr. Witt: May I say this so the record will be clear on it, your Honor?

The Court: Yes.

Mr. Witt: Mr. Kelley said the witness was being asked these questions only for the purpose of embarrassing him. It could be true that otherwise I would not mind the witness being embarrassed, but that has nothing to do with this line. The purpose of this line is, as I have explained to the Court. Number two, I am not rearguing it, your Honor has ruled, but I do want to say in terms of my understanding of the law that at this point I am not asking that your Honor agree with my interpretation of this circumstantial evidence. I don't think your Honor has to agree. Your Honor can be in violent disagreement. All I am saying is that there is enough here to justify inquiring of the witness as to this matter.

The Court: The Court feels there is not. So, the objection will be sustained to this type of testimony.

[fol. 942] Mr. Witt: Now, in light of that I wonder whether your Honor would permit me to ask him two or three other questions on this line, and Mr. Kelley I understand will object, and I understand your Honor will sustain the objections, because I think I would like at least the record to be clear as to these objective facts which this witness can testify to, and I think I should be permitted to ask him. Mr. Kelley may be right in saying that I confused this witness about Helena and Butte, but that is not important. We can clear that up. I want to get from the witness whether he was interrogated on two occasions by the Immigration Service about his past membership, one in '38 and one—

The Court: What is the relevancy of that?

Mr. Witt: In order to, if Mr. Kelley will now stipulate that, I won't have to ask the witness.

The Court: What is the relevancy if he stipulates to it?

Mr. Witt: Relevancy not in terms of testimony but in terms of the record I would like to have on this issue. But I have made it clear.

The Court: I want to know what makes it relevant even if they stipulate to it. What if he did, what is the relevancy?

Mr. Witt: Those are foundation questions I wanted to get to on what your Honor has sustained the objection. I think the record is clear enough, and I will drop it.

The Court: All right.

Mr. Witt: If the Court please, I intend to ask this man the same line of questions about his association with a union rival to Mine-Mill as I proposed to put to the prior witnesses.

The Court: I will sustain the objection to those if the situation is the same as in these other two cases.

Mr. Witt: But I will get into that in open Court, and your Honor will rule.

The Court: Yes.

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[fol. 943] **After Recess**

In Open Court

William Mason, resumed the stand, and testified as follows:

Cross Examination.

By Mr. Witt (Continued):

Q. Mr. Mason, when was it that you left Mine-Mill?

A. In December of 1953.

Q. At that time did you become employed by another labor organization?

A. Yes, shortly thereafter.

Q. About when? You say shortly thereafter. December or January of '54?

A. I was employed January, February, and March of '54.

Q. Isn't it true that in March of 1954 the National Labor Relations Board conducted an election among the employees

of the Anaconda Company in Montana to see whether those employees wanted to be represented by Mine-Mill or the United Steel workers of America?

Mr. Vincent: The Government objects to that. It doesn't seem to be relevant to this.

[fol. 944] The Court: I assume it is a preliminary question. You may answer, Mr. Mason.

A. There was such a National Labor Relations Board conducted election, yes.

Q. That was in March of '54, wasn't it?

A. Yes.

Q. Did you continue to work for United Steelworkers of America from January until after that election? Isn't that right?

A. The election was extremely late in the month of March. My connection with the United Steelworkers of America ceased at the end of March.

Q. Mine-Mill won that election among the workers in Montana, didn't it?

A. Yes, with the help of the corporations.

Q. Which corporations?

A. The copper companies in the industry. It is practically a company union ever since.

Q. Was Travis Secretary-Treasurer of Mine-Mill at the time?

A. Pardon?

Q. Was Travis Secretary-Treasury of Mine-Mill at that time?

A. Yes.

Q. Then is it your testimony that the copper corporations supported Mine-Mill in that election while Travis was Secretary-Treasurer?

Mr. Kelley: May it please the Court, the Government objects.

Mr. Witt: I withdraw the question. I withdraw it.

Q. Did you on behalf of the United Steelworkers of America—Strike that, please. Mr. Mason, from your experience in the labor movement you had become familiar with NLRB procedures?

A. Somewhat.

Q. You are familiar with the fact, aren't you, that under the National Labor Relations Act, if an employer helps a union in connection with an election, the other union if it loses can file objections with the Board to have that election upset, you know that rule?

Mr. Kelley: I object to that, your Honor.

The Court: I will sustain the objection. I think that is purely collateral.

Mr. Witt: The witness opened it up, your Honor.

[fol. 945] The Court: I say I will sustain the objection.

Q. Mr. Mason, after you stopped working for the Steelworkers did you continue to talk in Butte against Travis and Mine-Mill?

Mr. Vincent: If your Honor please, the Government objects to that question.

The Court: I didn't hear the question.

(The reporter read the last question.)

The Court: I think you may answer the question. The objection will be overruled.

A. I continued to expose Communist control of Mine-Mill.

Q. And then in continuing to expose Communist control of Mine-Mill you continued to talk against Mr. Travis, right?

A. Not particularly except as one of the Communists in control of Mine-Mill.

Q. After your association—strike that, please. What was your salary with the United Steelworkers of America while you were with them?

Mr. Kelley: The Government objects to that as irrelevant.

The Court: I will sustain the objection.

Q. What was the per-diem you received from the Steelworkers while you were with them?

Mr. Kelley: Same objection.

The Court: I will sustain the objection.

Q. Was your salary with the Steelworkers more than your salary as Executive Board member of Mine-Mill?

Mr. Kelley: Same objection.

The Court: I will sustain the objection.

Q. Was your per-diem with the Steelworkers higher than the per-diem while you were Executive Board member of Mine-Mill?

[fol. 946] Mr. Kelley: Same objection.

The Court: I will sustain the objection.

Q. After your association with the Steelworkers Union came to an end, Mr. Mason, did you become associated with or become employed by any other union?

A. No.

Q. Did you have any connection with a group in Butte which worked against Travis and Mine-Mill?

A. I supported the Miners Action Committee, a rank and file group devoted to freeing the Butte Union from the Communist-dominated Mine-Mill.

Q. That is after March of '54 when the rank and file miners in Butte rejected you and—

Mr. Kelley: That is argumentative.

The Court: I do not think that summary is warranted. He has answered the question, Mr. Witt.

Q. Mr. Mason, did you organize the Miners Action Committee?

A. I helped to organize it, yes.

Q. You and your brother, Joe?

A. My brother, Joe, assisted also in organizing it.

Q. That is the same brother Joe for whom you are working now?

A. Yes. I would like to explain my answer here.

Q. Go ahead.

A. Because that question has been asked and not answered. The organization of this committee took place not immediately after the NLRB election, and I was not personally rejected by the miners and smelter workers. I think you drop both of those hints in the question that I was not allowed to answer.

Q. I was going to ask you next, Mr. Mason, whether you recall when the Miners Action Committee was organized.

A. No, offhand, I do not recall. I would say it was a period of several months after the NLRB election, perhaps nearly a year. I cannot recall.

Q. And did the Miners Action Committee put out literature attacking Travis and Mine-Mill?

A. The Miners Action Committee put out literature exposing the Communist control of Mine-Mill. No question but that in its literature or in its handbills the name of Travis came up more than once.

[fol. 947] Q. Is the Miners Action Committee still in existence?

A. Yes.

Q. Is it still attacking Mine-Mill?

A. It is still exposing Communist control of Mine-Mill.

Q. To your knowledge is Travis presently connected with Mine-Mill in any way?

A. Pardon? I didn't get the question.

Mr. Witt: The reporter will please read the question.

(The reporter read the last question.)

A. I understand he is receiving some money from the union, but I am not familiar with the details surrounding this question.

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[fol. 951] WILLIAM MASON, a witness called on behalf of the Defendant, testified:

Direct Examination.

By Mr. Witt:

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[fol. 955] Mr. Witt: We pass the witness.

The Court: Is there any cross examination?

Mr. Kelley: No cross examination, your Honor.

The Court: All right. I think the Government said there was no redirect examination when he was your witness.

Mr. Kelley: That's right, your Honor.

In Chambers

The Court: I think you had better let the record show what request you intend to support by this witness. I think the record ought to show preliminary to his examination in support of what request that you are taking his testimony.

Mr. Witt: We are taking his testimony in support of our motion for statements under Section 3500 to determine whether we have been furnished everything under 3500 to which we are entitled, number one, and, number two, also to lay a foundation for a renewal of the motion for the production of his grand jury testimony in this Court in 1954 and 1956.

[fol. 956] William Mason, a witness called on behalf of the Government, testified:

Examination by Mr. Witt:

Q. Mr. Mason, were you ever interrogated by a person representing the Immigration Service about Mr. Travis?

A. No, not that I recall.

Q. Before you testified in the NLRB proceeding in May, 1954, did you have any talks about the testimony you would give in that proceeding with any person representing the NLRB?

A. There was some discussion with Mr. Foley who was the representative of the NLRB. He asked me some questions, and I gave him some answers. I don't recall what was specifically said by either myself or Mr. Foley, but it had to do with my knowledge of what the hearing is all about and questions concerning compliance with the Union and the Union's newspaper, whether it is received by members, et cetera. I can't recall it in detail.

Q. Is that the same Mr. Foley who was counsel for the Board in the open hearing in May of 1954?

Mr. Vincent: Would you repeat that, please? I didn't catch that question.

A. Yes.

Q. On how many occasions did you talk to Mr. Foley?

A. I think only on one occasion before the hearing. I do not recall whether he called me concerning an affidavit or not or whether he had written to me about it, but there was some contact with him concerning the affidavit.

Q. Well, perhaps I should have asked you, did you see Mr. Foley face to face before you took the witness stand in that hearing?

A. Yes.

Q. And do you recall when that was or about when?

A. I seem to recall it was the night before the hearing commenced.

Q. So that conversation with Mr. Foley took place in Washington, D.C.?

A. Yes.

Q. Where did it take place in Washington?

A. I believe in my hotel room. I am not too sure about that. It may have been in someone else's hotel room. I believe the hotel is the Raleigh.

Q. At the Annapolis?

[fol. 957] Mr. Kelley: The Raleigh.

Q. You used to stay at the Annapolis, didn't you, Mr. Mason?

A. Yes, it is one of my favorite hotels.

Q. About how much time did you spend with Mr. Foley at the Raleigh on that occasion?

A. I do not recall.

Q. Approximately? Was it one hour or five hours, 10 hours, five minutes?

A. It was not five hours. It may have been less than one or more than one hour.

Q. Now, on that occasion did you tell Mr. Foley about your conversation with Travis?

The Court: Let's see, first, Mr. Witt, I think we simplified it the other day, let's see if there would be anything that would some into the category of statements and get into the relevancy then.

Mr. Witt: I am sorry. I haven't been brought up to date in the improvement of the procedure.

The Court: I altered it, and Mr. Deikman followed it.

Q. On this occasion did you talk to Mr. Foley about Mr. Travis?

The Court: No.

Mr. Witt: I think I understand.

Q. On this occasion did you give Mr. Foley anything in writing?

A. Not on that occasion. However, I gave him an affidavit if I recall correctly that had been mailed to him by me from Butte.

Q. By that, Mr. Mason, you mean that prior to this session with Mr. Foley at the Raleigh you had mailed them an affidavit from Butte, is that it?

A. That is my recollection. I would like to add that it is the signing of that affidavit—

Q. I am not asking you that. I will get back to that, Mr. Mason. It is confusing.

A. I had something else in mind.

Q. Go ahead. I don't want to stop you.

The Court: Go ahead with questions, because one thing, the witness may not know that I think he is entitled to know, that I assume that the affidavit he is talking about [fol. 958] has already been turned over or furnished to the defense.

Mr. Witt: I don't think he should be told that.

Mr. Kelley: Yes.

Mr. Witt: I object to that. I will get to the affidavit, but I think we are entitled to do it in our own way.

The Court: You can go ahead with this matter now.

Q. I am still talking about the session with Mr. Foley at the Hotel Raleigh, Mr. Mason. In that session did you, coming back to the question I asked you, did you furnish Mr. Foley with anything in writing?

Mr. Kelley: It has already been asked and answered.

Mr. Witt: I am sorry.

Q. On that occasion did Mr. Foley ask you questions and did you make answers to his questions?

A. Yes, there were some questions asked.

Q. And did Mr. Foley make notes of what you told him?

A. I think he took some notes.

Q. Before you took the witness stand in the open hearing before the Examiner of the NLRB did Mr. Foley show you anything in writing based on his discussions with you?

A. I don't recall anything.

Q. Now, Mr. Mason, going back to what you said about having sent Mr. Foley an affidavit before you met him in Washington at the Hotel Raleigh about when was that that you sent him that affidavit?

A. I cannot recall the date, but it was during the heat of the campaign between the Mine-Mill and the United Steelworkers. I wanted to say a moment ago that I did not realize that the signing of the affidavit would place me on the witness chair or perhaps I would not have signed it. Subsequently, that action was responsible for me being a witness in other matters. I signed the affidavit in the heat of the campaign, and I believe I mailed it to Mr. Foley at Washington.

Q. Who asked you to sign that affidavit, Mr. Mason?

Mr. Kelley: May it please the Court, there is no point of going into that, because it has already been produced.

[fol. 959] The Court: I don't see any point, Mr. Witt, because they furnished the affidavit.

Mr. Witt: Well, your Honor, again, I do not think it is fair to us to say it in the presence of the witness, but I don't think it matters too much. May I say what I am trying to do? I am not going into the affidavit. I want to ask if other events took place at that time.

The Court: If it is something along that line, maybe it is proper. The reason I think it is proper to tell the witness and to leave the affidavit out of this proceeding, this proceeding is actually limited to something that hasn't been produced.

Mr. Witt: I understand that, and that wasn't in my mind when I asked this question. I wasn't going into the affidavit we have here. I will be glad so there is no question to say to Mr. Mason that we have a copy of that affidavit. I don't intend to ask any questions about it.

Q. I will come back to the question I was asking you, who was it, who asked you for that affidavit?

A. If I recall correctly, the affidavit was sent to me by

Mr. Foley with an accompanying letter asking me to sign it. I am not too clear on this, however. There may have been a request to sign it made of me by Mr. Foley or a telephone call. I can't recall. We were in the heat of the campaign, and all I know is I got the affidavit, signed it, and I am very certain I mailed it to Mr. Foley.

Q. Then, do I gather that you didn't see Mr. Foley before you met him in Washington at the Hotel Raleigh and that your only contact with him was probably over the phone when he told you that he would prepare an affidavit and send it to you, is that about it?

A. I don't recall having seen Mr. Foley before I met him in Washington.

Q. Aside from Mr. Foley did anybody else talk to you before you took the witness stand in the hearing before the NLRB about the testimony you would give?

A. I don't recall that there was any other discussions with anyone with the possible exception of with a fellow anti-Communist who came to Washington with me from Montana, Charles McLane. There may have been some discussion with him. I can't recall.

[fol. 960] Q. Before you signed the affidavit did you talk to any other agent of the Government about the NLRB proceeding or the affidavit?

A. Not that I recall. I believe the only one I had occasion to talk to about it was the attorney that notarized the affidavit.

Q. Emigh?

A. Emigh.

Q. He was one of the attorneys then representing the United Steelworkers of America?

A. Yes, I believe he did some work for the Steelworkers.

Q. Well, specifically, before you signed the affidavit did you discuss the matter with Tom Zoeller of the FBI?

A. I would say, no, I cannot recall any discussion with Tom Zoeller with reference to this matter.

Q. Did you discuss it with any other FBI Agent?

The Court: We are talking about this affidavit?

Mr. Witt: I want to see if we can get into other material we are entitled to.

The Court: I haven't heard any question.

Mr. Witt: I am referring to the affidavit just to place it in time, but I am not getting into the affidavit.

A. No, I don't know any other FBI Agent.

Q. Mr. Mason, before you took the witness stand against Travis on the first trial did you talk to any Agent of the Department of Justice about the testimony you would give against Travis in that trial?

The Court: Well, that covers everything. You have been over that on the witness stand. You mean on the occasions of his coming here?

Mr. Witt: Yes. I don't think I asked him about that in open court.

Mr. Kelley: You used the word "agent".

The Court: Your question was, did he ever before he testified in the Travis trial, did he talk to anybody. He has been over that. Did you mean that did he talk to anybody here on the occasion of his testifying?

[fol. 961] Q. Did you hear what the judge said, Mr. Mason?

A. I would rather the question was repeated.

Q. After you got to Denver in connection with your being a witness against Travis on his first trial and before you took the witness stand did you talk to any agent of the Department of Justice about your testimony?

A. Yes. There was some questions and answers. I can't recall it. As a matter of fact, there have been a number of these things, and I cannot recall who the representatives were.

Q. I was going to ask you that next. Then you don't recall who was who from the Department of Justice you talked to in Denver?

A. It may have been Mr. Mitchell, perhaps even a word or two with the District Attorney, but I am not sure.

Q. Mr. Mason, you are probably getting tired like the rest of us, but will you try to keep your voice up a little? Was it Mr. Swanson, an Assistant United States Attorney here?

A. Yes, I remember Mr. Swanson.

Q. Did you talk to him?

A. I cannot recall that I did.

Q. Did you talk to any FBI Agent about your testimony before you took the stand?

A. No, not about testimony.

Q. Do you recall how many talks you had with the attorney even though you can't recall exactly which attorneys—

Mr. Kelley: May it please the Court, we object to this line of questioning. It wouldn't make any difference how much he talked to them, whatever they got would be work product.

The Court: Let him answer if he recalls. It is preliminary.

A. I can't recall. There may have been a lunch or two or maybe a dinner, maybe an exchange of information concerning weather. I am not sure what is meant by the question.

Q. Well, I am asking you about talking to the attorneys about Travis in preparation for your taking the witness stand.

Mr. Kelley: Mr. Witt, I object to that type of question. Why not ask him if we took any statement and submitted it to him, he signed any, or something like that?

Mr. Witt: I don't think it is right. I don't agree with you.

The Court: Well, proceed. He has answered the qu stion.

[fol. 962] Q. Mr. Mason, in connection with the talks you had with the attorneys, you know who I am talking about, the talks in Denver about the Travis case, do you remember any of the attorneys taking notes when you talked to them?

A. Yes, these attorneys are always taking some kind of notes. I believe they did at that period too. I cannot recall. I can't recall the actual incident of taking actual notes.

Q. On any of those occasions did you give any of the attorneys anything in writing pertaining to the testimony you were going to give against Travis?

A. Not that I recall. I did, however, on some occasions,

and I cannot remember at which of these proceedings this was, perhaps gave them a copy of the constitution of the union, and, if I am not mistaken, somebody some place has a couple of copies of the proceedings in Mine-Mill Convention that are my property which I hope to get it back. I cannot recall on which occasion.

Q. Do you recall giving any of these attorneys, I am still talking about the same period when you were in Denver before you took the witness stand in the first trial, do you remember giving them copies of minutes of Mine-Mill Executive Board meetings?

Mr. Vincent: If your Honor please, even if he did, it would not be a statement of this witness.

The Court: I think I will sustain the objection to that.

Q. Do you recall whether after you talked to any of these attorneys they showed you anything in writing based on your talks with them?

A. No, I recall of no such thing.

Q. Do you recall whether after you talked to these attorneys that you signed any document that was prepared by the attorneys?

A. No.

Q. You didn't sign any affidavit?

A. No.

Q. Mr. Mason, I think you testified in open court that you appeared before the grand jury here in 1954 before Travis was indicted, is that right?

A. I don't recall whether I answered it or whether there was an objection from the Government attorneys, but I did testify before the grand jury.

Q. Before you went before the grand jury did you talk to any attorneys representing the Government here in Denver about the testimony you would give before the grand jury?

A. Yes. I met someone I am sure before appearing before the grand jury. I am somewhat confused as to who was [fol. 963] at which of these proceedings. That is why I cannot answer as to names.

Q. Well, just to see to refresh your recollection was it Mr. Kelley?

A. Mr. Kelley was there, yes.

Q. Was Mr. Mitchell one of them?

A. That I am not sure.

Q. Mr. Swanson?

A. Mr. Swanson I believe was there.

Q. How many talks did you have with the attorneys on that occasion?

A. I can't recall. The talks weren't always about the subject for which I came to Denver. They were social discussions.

Q. I assumed we understood each other, but, just to make it clear, I was asking about how many talks you had about Travis or about the testimony you were to give before the grand jury.

A. I cannot recall.

Q. Can you recall whether any of the attorneys made notes on any of these occasions?

A. I can't recall. They probably did.

Q. Can you recall whether on any of these occasions any of the attorneys showed you anything in writing based on their talks with you about Travis and the testimony you were to give before the grand jury?

A. I believe not.

Q. Then you don't recall signing anything prepared by any of the attorneys?

A. No.

Q. Was any stenographer present on any of these occasions when you talked to the attorneys prior to your going before the grand jury in 1954?

A. No.

Q. On any of these occasions did you give any of the attorneys anything in writing about Mr. Travis?

A. I already answered that question. Somewhere down the line I lost a constitution and a couple of convention proceedings. I cannot recall—

Q. Did you also testify before a grand jury in this court—

In Chambers

The Court: I think Mr. Witt was starting to interrogate about the grand jury here and then starting on another grand jury.

Mr. Kelley: Yes.

WILLIAM MASON, testified as follows:

Examination.

By Mr. Deikman:

Q. Did you have occasion, Mr. Mason, to appear before a grand jury in Denver in 1956?

A. Yes.

[fol. 964] Q. And did you speak to any attorneys at that time for the Government?

A. Yes.

Q. What attorneys were those?

A. I am not sure as to who they were. I very likely spoke to Mr. Kelley.

Q. Would it refresh your recollection to mention the name of Mr. Broome?

A. Yes. I met Mr. Broome in Denver, but I don't recall on which occasion.

Q. You are not sure it was this occasion that you are speaking of right now?

A. No, I am not sure of that.

Q. Would it refresh your recollection in regard to just previous to your appearance before the grand jury in Denver in 1956 to mention the name of Mr. Heflin?

A. Yes, I met Mr. Heflin too.

Q. And would it refresh your recollection to mention the name of Mr. Saar?

A. No, I don't recall meeting a Mr. Saar.

Q. Would it refresh your recollection to mention the name of Thomas Mitchell?

A. Yes, I met Tom on a couple of occasions.

Mr. Kelley: He is referring to before this grand jury.

A. I am not sure.

The Court: Nineteen fifty-six.

Mr. Deikman: Yes.

A. I am not sure on which occasion I met these people.

Q. You are not sure whether you met Mr. Mitchell before the grand jury in 1954 in Denver or the grand jury in 1956 in Denver?

A. Or the original trial. There are three occasions for me to visit here, and I met these people and can't place the occasion.

Q. Did you have occasion just previous to your appearance before the grand jury in Denver in 1956 to spend more time discussing your testimony before that jury with one attorney more than any other?

A. I would say that it is quite possible. I don't recall. I talked to a number of people.

Q. Do you recall how many times during that period that you talked to Mr. Kelley?

A. No, I would have to make a guess at it.

Q. Would you make an estimate?

A. Oh, I would say—you were asking me with respect to discussing the subject of the grand jury or—

[fol. 965] Q. The subject of your testimony before the grand jury at that time.

A. I would say once or twice.

Q. That is with Mr. Kelley?

A. Yes.

Q. And how long was your conversation at that time on the one or two occasions?

A. Probably brief conversations between sessions, lunch periods or something like that. I do not recall any formal discussion that has to do with the subject I was in Denver for at that particular moment. I don't recall any such formal discussion with Mr. Kelley.

Q. Do you recall how many times you talked to Mr. Broome?

The Court: He hasn't said he talked to him at all. He said he remembered meeting him. Ask him if he talked to anyone else about his testimony.

Q. Did you talk to anyone else about your testimony?

The Court: Any other lawyer.

Q. Any other attorney for the Government?

A. With respect to testifying—

The Court: This 1956 grand jury.

A. I probably did. I don't recall.

Q. Would it refresh your recollection to ask you whether you talked to Mr. Broome about your testimony?

A. I can't recall talking to him. I recall only meeting him on at least one occasion here in Denver, but I don't know which.

Q. Aside from Mr. Kelley on that occasion can you estimate how many hours you spent speaking to other attorneys concerning your testimony?

A. No, I can't. I work for a living. I don't live these cases or go to sleep with them. I come down here to Denver, and Government attorneys ask a question or two, and I answer, and that is it. I am not that interested in these proceedings that I should compute the number of hours spent in discussing anything involved in them.

Q. Can you recall whether Mr. Kelley or any other attorney at that time took notes relative to your conversations at that time or during your conversations at that time?

A. No, I can't, but there were times that some of these people took notes, nothing that I saw or nothing that I can say is an account of anything I said.

[fol. 966] Q. During the conversations that you had during this period, and still speaking of just before the grand jury in 1956, did you observe the presence of any stenographer?

A. Did I what?

Q. Did you observe the presence of any stenographer during your conversations?

A. I don't know.

Q. During that time did you submit anything in writing to the attorneys for the Government?

A. Did I submit anything in writing?

Q. Yes, sir.

A. No.

Q. Have you had occasion to appear before any other grand juries besides the ones that we have already mentioned and about which you have testified which grand juries elicited your testimony in regard to any violations similar to the Taft-Hartley Act, Smith Act, or anything in that area?

Mr. Kelley: The Government objects to that as incompetent going into what was considered before a grand jury, any grand jury. If he wants to ask if he attended, went to some place for the purpose of giving testimony, that is one thing, but asking him if he testified before a grand jury as to a certain matter is improper.

The Court: I am inclined to think that's right, but I think what Mr. Deikman's question was was before any grand jury in which that matter was involved, and that was with respect to what he testified to.

Mr. Kelley: If he goes into Smith Act and so forth, that is irrelevant too.

The Court: Let's find out what the fact is, whether he testified before any other grand juries that were investigating any of these matters, not with respect to what his testimony was. Did you appear before any other grand jury that involved any of these matters?

The Witness: Besides the two?

The Court: Besides the two here in Denver.

The Witness: No.

Mr. Deikman: Just in respect to that, your Honor, I [fol. 967] would appreciate it if Mr. Kelley's or the Government's objections were consistent, because the last time I asked a similar question they objected on the grounds this might have been a grand jury in relation to anything, so, I had to more or less define the area in which the grand jury was investigating.

The Court: He has answered the question.

Mr. Deikman: If Mr. Kelley will permit me to ask this question—

Q. Do you recall testifying before any other open court proceedings in the nature of a criminal trial other than the ones you have already mentioned?

The Court: Well, I don't think that is a proper question. As I pointed out the other day, that comes back to what we were talking about a minute ago. He may have testified in a police court case up in Butte, Montana, about something entirely detached. That covers all criminal cases.

Mr. Deikman: That is why I would like to add to that question concerning—

The Court: I do not think there is any point to that. I will sustain the objection. There wasn't one.

Mr. Kelley: I permitted him to answer that, your Honor.

Mr. Deikman: Well, in view of the Court having made the objection I will rephrase the question.

Q. Do you recall having testified in any other criminal proceedings in open court other than the ones you have already testified involving violations of Taft-Hartley Act, Smith Act, or anything in that area where your experiences with Communists would be relevant?

Mr. Vincent: The Government objects to that, your Honor.

The Court: Well, I think I will let him answer it. Technically, I think the objection is good, but I think to expedite matter. I will let him answer it.

[fol. 968] A. No.

Q. Do you recall having been interviewed on August 7, 1953, by Mr. Zoeller?

Mr. Deikman: I do not know whether that appears already in the record or not.

The Court: It does very definitely.

Mr. Crandall: It does.

Mr. Kelley: It has been gone into extensively.

Mr. Deikman: I want to apologize for that. We didn't get the transcript until early this morning.

The Court: I think that was part of the statement introduced in evidence to fix the date, wasn't it?

Mr. Deikman: Well, the date of the statement is August 10, 1953, and I am asking about August 7, 1953.

The Court: That is the date of the interview. That is covered by the August 10 report. You can look at the record if you want to.

Mr. Kelley: That is Exhibit R.

The Court: It is easy to find.

Mr. Deikman: I am sure it was gone into now that I have had an opportunity to reflect on it. That is probably on page 1501.

The Court: It is on page 1501.

Q. On August 7, 1953, did Mr. Zoeller take any notes of your conversation with him?

Mr. Kelley: I object to that as having been gone into, and the report is in evidence on that.

The Court: I thought it had been.

Mr. Kelley: On that interview.

[fol. 969] Mr. Deikman: I do not believe that question was asked, your Honor.

Mr. Kelley: That question was not asked, but you have been into this subject matter.

Mr. Deikman: We are going into a different sort—

The Court: I thought it had been gone into.

Mr. Vincent: We haven't established there has been a conversation yet.

The Court: That is in the other record. That is on page 1501. It says, "Did you have a conversation?" And he says, yes, he did. What he is asking is if he remembers there were any notes made on that occasion by Mr. Zoeller.

A. I don't remember. I take it for granted, however, that he did.

The Court: What is the point to that, because the statement was furnished, wasn't it?

Mr. Vincent: Yes, sir.

The Court: So, I don't think we need to pursue that.

Mr. Deikman: May I explain the point, your Honor?

The Court: All right.

Mr. Deikman: This statement is dated, of course, August 10 stating that William Mason orally advised about certain matters on August 7, 1953. Now, obviously, the August 10 report is based upon an interview and possibly other notes which may fall within Section 3500 other than Defendant's Exhibit R.

The Court: I do not think that assumption is sound at all, because the Government has furnished the report which apparently was made on August 10 of the conversation with the witness and Mr. Zoeller on the 7th.

[fol. 970] Mr. Kelley: How would this witness know whether or not even if he saw him taking notes that they were in existence? He could not possibly know.

The Court: I think where there is a statement that has been furnished of a conversation, that there is no further inquiry. It would have to go to the subject matter, and that isn't pertinent.

Mr. Deikman: Just one further word on that, your Honor, at least for the record: This particular report states that as it has already been mentioned in evidence that William Mason really told Travis off including charges of Communism on the part of Travis. Now, that sentence has been considerably expanded upon in the testimony. It appears to be a very brief statement by the FBI Agent as to what Mr. Mason told him, a sort of capsule comment on something that obviously is much more lengthy, and it would seem to be logical that the FBI Agent involved would have taken more extensive notes on his own as to exactly what Mr. Mason told him in order to make that capsule comment.

The Court: How would this witness know?

Mr. Deikman: Well, he has testified that he assumes that Mr. Zoeller or whatever FBI Agent it was did take notes. Now, my next question would go into more details concerning that.

The Court: Well, he says he doesn't know. He testified, if my memory is right, if it is not, we can get it corrected quickly, he didn't know what Mr. Zoeller wrote down and didn't see his notes. Isn't that what he testified to?

The Witness: Yes. That is what it was anyhow.

Mr. Kelley: I think Mr. Deikman's statement points up the fallacy of the whole thing of permitting the cross examination from hearsay reports.

The Court: Well, I think we are past that. Furthermore, my memory is that he was interrogated in open court about what he meant by this statement and all of that within the record now.

[fol. 971] Mr. Deikman: I think there were objections to specific questions about that which were sustained by the Court.

The Court: It is easy to find out.

Mr. Deikman: In any event I do not believe we can go into exactly what he told him. As a matter of fact, on page 1506, your Honor—

The Court: He read that sentence to him, and the witness answered: "I don't recall saying anything like that. I recall it was a conversation with him concerning the situation in the Union. I do not regard," and so forth. There is another place that he was asked about the question if my memory is good. Go ahead. I don't think you need to go into this, so, I will sustain the Government's objection.

Mr. Deikman: Particularly in view of the fact that he doesn't recall having said anything like what this report says he said, I think Mr. Kelley is right, that this particular report is hearsay. It is a statement or a comment on the part of this FBI Agent.

The Court: I cannot understand, if you will tell me what the point is you are trying to get at, I could maybe understand it better. If it is what I understand it to be, I am very sure that it has no relevancy, but I do not understand. What are you trying to establish?

Mr. Deikman: It may be possible, I am not saying we can do it, it may be possible to inquire from the witness in sufficient detail to establish that on August 7 sufficient writings were made to constitute a statement under 3500. Now, Mr. Kelley said—

The Court: Ask him that. Ask him—he has already answered you that he thinks that whatever this man's name was made notes. Now, proceed from there.

Mr. Deikman: I think we will have to do that by circumstantial evidence, so, I will ask him if he can recall how long his interview with Mr. Zoeller on August 7 was.

A. I don't remember.

[fol. 972] Q. I will ask you to look at Defendant's Exhibit R and ask you if that refreshes your memory sufficiently so that you would be able to estimate the time you spent with Mr. Zoeller covering that subject matter.

Mr. Kelley: May it please the Court, it doesn't seem to me that is relevant.

The Court: You need not answer that question. He answered that he doesn't recall.

Mr. Kelley: The question is whether there were any notes he adopted as his own.

Mr. Deikman: I considered that part of the subject matter. I will drop it. I mean I considered it to be circumstantial.

Q. Did Mr. Zoeller on that occasion exhibit anything that he had prepared as a result of his conversations with you for your inspection?

A. No.

Q. Where did that conversation take place, Mr. Mason?

A. I am not sure, but I think it took place at the headquarters of the FBI in Butte.

Q. Was anyone other than Mr. Zoeller present at that time?

Mr. Kelley: The exhibit shows that there was and that was gone into.

The Court: I do not think where the report has been furnished, unless there is something that doesn't appear from the report or something, that you need to interrogate him at all.

Mr. Kelley: When I mentioned the name "Agent" in reference to it he pointed out that two agents were present, and he wanted the record to be clear on it.

Q. Did Mr. Kreitner take notes on that occasion?

A. I don't recall Kreitner being there. I assume from this discussion that he was, but part of it—

The Court: You do not recall of your independent recollection that anyone was there except Mr. Zoeller, is that right?

[fol. 973] The Witness: That's right.

The Court: Proceed.

Q. In the course of any of your conversations with the Federal Bureau of Investigation was any stenographer present?

A. No.

Q. During the course of any of your conversations with the Federal Bureau of Investigation or agents for that Agency was anyone present other than the agents who appeared to be taking stenographic or other kind of memoranda or notes?

A. No.

Mr. Deikman: Now, not going over this affidavit again, your Honor, Mr. Witt covered that, but I would just like to ask one more question concerning that affidavit.

The Court: All right, what do you mean by that?

Mr. Deikman: The affidavit provided to the National Labor Relations Board.

The Court: The National Labor Relations Board affidavit?

Mr. Deikman: Yes.

The Court: All right.

Q. Since you testified that this affidavit was sent to you through the mail—

The Court: I do not think he testified to that. He was uncertain about how he got it, but I had better let him answer, but he said he was reasonably sure that he sent it to them.

Mr. Deikman: Maybe I had better phrase the question this way.

Q. Am I correct that you said yesterday that you received a prepared affidavit through the mail?

Mr. Crandall: Objection, your Honor.

The Court: It is in the record.

[fol. 974] Mr. Kelley: It has been gone into, that affidavit, rather extensively.

Mr. Deikman: I wanted to ask another question, but I want to found it on what I believe his testimony to be that he received it through the mail.

Mr. Kelley: My recollection was that he said he got it from the attorney for the NLRB—no, not from the attorney for the NLRB but this attorney that was out in Butte for the CIO.

The Court: Let's look at the record. There is no use of arguing about it. It is all in here. You interrogated at great length about it. It starts on page 1594.

Mr. Deikman: He says, "The affidavit was sent to me by Mr. Zoeller with an accompanying letter asking me to sign it."

The Court: That is all right. Start from there. He said, "I am not too clear on this, however. There may have been

a request to sign it made of me by Mr. Foley or a telephone call. I can't recall. We were in the heat of the campaign, and all I know is I got the affidavit, signed it, and I am very certain I mailed it to Mr. Foley." That is my recollection of the testimony. So, start from there.

Q. Based on your testimony which appears at page 1597 of the transcript, "If I recall correctly, the affidavit was sent to me by Mr. Foley with an accompanying letter asking me to sign it," am I correct in interpreting that—

The Court: The answer—you need not answer the question, and you can proceed to something else. The answer is here in the record and very clear, and I will read the whole answer so that there is no mistake in the record. "If I recall correctly, the affidavit was sent to me by Mr. Foley with an accompanying letter asking me to sign it. I am not too clear on this, however. There may have been a request to sign it made of me by Mr. Foley or a telephone call. I can't recall. We were in the heat of the campaign, and all I know is I got the affidavit, signed it, and I am very certain I mailed it to Mr. Foley." That is his testimony, and we need not go back over it.

[fol. 975] Mr. Deikman: I am not trying to go back over it. I wanted to ask this question in view of that answer.

Q. In view of that answer, Mr. Mason, could you tell us how the information was obtained for the preparation of this affidavit?

Mr. Crandall: Objection, your Honor.

The Court: Well, the answer has nothing to do with it. If you want to ask him where the information in the affidavit came from, you can ask him that.

Q. Could you answer that question, Mr. Mason?

A. I am not sure I understand. I can't recall the content of the affidavit, but I seem to recall it had something to do with whether I know or do not know that the paper published by the Union is received by the membership.

The Court: The affidavit has been furnished. I do not know the point to it.

Mr. Deikman: I would like to know whether there were any reports made upon which that affidavit was based.

The Court: How would he know what somebody else prepared in an affidavit? The question should be directed to anything he discussed with somebody before the preparation of the contents or something like that.

Q. Did you discuss the contents of that affidavit with anyone before it was prepared?

A. No.

Mr. Deikman: Your Honor, may I go into some of the subjects contained in that affidavit and ask him if he had occasion to tell the FBI—

The Court: I do not see the point. The affidavit has been furnished in its entirety. If you will tell me what the point is—

Mr. Deikman: That's right, your Honor. I think that is clear from the answer the witness gave concerning that that it wasn't prepared in his presence, that it was not made [fol. 976] contemporaneously with his relation of the subject matter that is contained in that affidavit, and, therefore, I think it is logical to assume that the information was obtained on other occasions than at the time he signed it.

The Court: The affidavit is here, and he has signed it, and that is his statement. You have asked him if he conferred with anybody before it was drawn, and he said he didn't, and the statement is here with reference to—it is his own statement under the statute, and here it is. So, I do not think there is any purpose to be drawn from that.

Mr. Kelley: It is also a fair inference he had a conversation with Mr. Foley over the phone, at least he thought he did, and Mr. Foley asked him if he would sign it, that that would be a more fair assumption that Mr. Foley got the information in talking to him over the phone.

The Court: The way it stands in the record it seems more obvious to me. It has been furnished to them as this witness's signed statement.

Mr. Kelley: Right.

The Court: And that is it. That is his statement.

Mr. Deikman: Just so the record may be clear on it, I am not going to argue the point any further, but it is our position that this affidavit was not prepared in his presence. He stated that he never—

The Court: Mr. Deikman, that is so utterly ridiculous. The statute permits a statement signed by him to be admitted in evidence.

Mr. Deikman: That is not the point I am getting at.

The Court: That is the point I am getting at, and it has been indicated on that basis.

Mr. Deikman: That's right, your Honor. It is a statement under Section 3500, but we feel that the record will show that it is obvious that he must have had conversations to support that.

[fol. 977] The Court: What if he did?

Mr. Deikman: If he had conversations to support this, it is obvious that we are entitled to go into what occurred so that we can determine whether we have been provided with all the statements under Section 3500. I think the Government is taking the position that we have to be satisfied that the Government has provided us with all statements just because the statements have been provided us.

The Court: Your statement isn't supported by the record or by the facts or by this witness's testimony. So, you may proceed with something else.

Mr. Deikman: Well, your Honor, in view of the fact that I feel that all my other questions to this witness would go to the same material in regard to other statements that we have been provided, in other words, that it appears to us that we have the right—

The Court: If you will proceed to ask your questions instead of arguing, why, we will make some headway.

Mr. Deikman: I am not going to ask questions. I am going to make the record that all our questions which we feel would be proper to ask now, because we would be trespassing on the ruling—

The Court: How can the Court rule on the propriety or impropriety of other questions without having them asked? We are not going to read the record in the state of some inconceivable line of questions that you aren't going to go into in the present state of the record. So, if you have any questions, ask them.

Q. Mr. Mason, you have testified that you had a conversation with Mr. Zoeller on or about August 24 and 25, 1954. Do you recall how long those conversations lasted?

A. First, I don't recall testifying. I might have on the basis of some question said that I suppose I did meet with Mr. Zoeller, but to the best of my recollection I didn't testify that I did meet. My memory is not that good.

Q. I ask you to look at Defendant's Exhibit Q, and I will ask you whether that refreshes your recollection that you [fol. 978] did have conversations with Mr. Zoeller on or about August 24, 1955.

The Court: Was this asked in the courtroom?

Mr. Kelley: It seems to me—

Mr. Deikman: He said he didn't testify to that.

The Court: Look at the record.

Mr. Kelley: He said—you misquoted the record—he didn't recall talking to them on that date. He agreed that the document indicated he had done so, and he assumed it was correct, but that is as far as he has gone on any of these. He hasn't any independent recollection of having talked to him on any specific date. It is at the bottom of page 1494. So, let's start from there.

Q. Mr. Mason, you testified that you had a conversation with Mr. Zoeller August 24, 1955.

The Court: The answer is on 1495. The witness says: "Answer: Does it refresh my memory as to the date of the conversation? Question: Yes. Answer: No, but the date appears there, and I assume that the date is correct."

Q. Now, on that occasion, Mr. Mason, do you recall whether or not Mr. Zoeller took notes concerning your conversation?

The Court: He says he doesn't recollect the conversation. If I can read the English language, it says: "Does it refresh my memory as to the date of the conversation? Question: Yes. Answer: No, but the date appears there, and I assume that the date is correct."

Mr. Deikman: He says he doesn't remember the date of the conversation but now that we have placed the date I would like to ask him whether he recalls whether Mr. Zoeller took notes on that date concerning his conversation.

Mr. Vincent: We have a report in evidence in the record.

The Court: I think I told him to go ahead and answer the question. You may answer. Going over these categorically, the witness has testified about the general prac-
[fol. 979] tice. Answer if there were any other notes taken if you recall.

A. I don't remember, but I assume from seeing this document now that they must have taken some notes.

Q. Do you recall how long that conversation lasted?

The Court: What is the point? If the Government will object, I will sustain the objection.

Mr. Kelley: The Government objects to this whole line of questioning, because it is irrelevant.

The Court: The statement has been furnished, and the statement is in the hands of defense counsel.

Mr. Deikman: I will be satisfied with your sustaining the objection, because we will have made the record. I will ask the question, and Mr. Kelley can object, and the Court can sustain the objection, but I would like to ask the question for the record.

The Court: Proceed.

Mr. Deikman: That question has been asked and answered and the objection has been made and the objection has been sustained.

Q. Now, I will ask whether looking at this exhibit, Mr. Mason, whether your recollection is refreshed so that you would be able to say that you had a conversation also on August 25 with Mr. Zoeller.

A. In addition to this?

Q. In addition to the one on August 24.

A. I don't recall.

Q. You don't recall?

A. No.

Mr. Deikman: Before I ask this question I would like to point out to the Court that Defendant's Exhibit T is a typewritten copy of a statement given by the witness.

Mr. Kelley: And signed by the witness.

Mr. Deikman: And signed by the witness. Now, Mr. Kelley can correct me if I am wrong, but it seems to me that

I recall in the last trial that there was a handwritten statement covering the identical subject.

[fol. 980] Mr. Kelley: I don't recall that, but I recall that you got the statement, and I think it was offered in evidence, whatever it was, in the last trial with some portion of it stricken out.

Mr. Deikman: In view of the fact that Mr. Kelley doesn't recall this may I ask whether or not he did give a handwritten statement?

The Court: The record in the other trial will show, so, I am not going to put this witness's memory to a test about what somebody offered in evidence at the other trial if that is what you are getting at.

Mr. Deikman: I want to ask him whether this Defendant's Exhibit T is based on a handwritten statement that was given.

The Court: I think he testified about it already in court in great detail, didn't he?

Mr. Deikman: I don't believe anyone asked him about a handwritten statement.

Mr. Kelley: I do not think they asked him that specific question. The same statement as I recall was furnished the defendant in the last trial, and I think it was even admitted into evidence, isn't that correct, Mr. Deikman?

Mr. Deikman: That's correct.

Mr. Kelley: I don't get the point.

Mr. Deikman: As I recall, it was handwritten. I may be wrong. The record doesn't reflect whether it was handwritten or not.

The Court: The exhibit is here if it was offered in evidence.

Mr. Deikman: That's right. I haven't had an opportunity to look at it.

The Court: You had better check on that.

[fol. 981] Mr. Kelley: If you find any discrepancies, then you can point out—

Mr. Deikman: I am not suggesting, Mr. Kelley, there are any discrepancies. What I am getting at is whether this statement was prepared by the witness, and—

The Court: He has testified to that in this trial yesterday several times. I am not going to—

Mr. Deikman: All right.

Q. Now, on page 1556 of the record appears this question and answer: "Mr. Mason, I will ask you to look at Defendant's Exhibit U for identification consisting of three pages beginning on our page 29 and ask you whether that doesn't refresh your recollection that you talked to Mr. Zoeller on April 13, 1955, which date I am pointing out to you appears on the second of these three pages. Answer: I remember the conversation, not in detail, however." Now, Mr. Mason do you recall whether Mr. Zoeller took notes on April 13, 1955, concerning your conversation with him at that time?

Mr. Vincent: The Government objects to that. I cannot see any point to this.

The Court: I don't know whether he did or not. The witness can answer the question.

A. Is this conversation bearing on the statement I signed?

Q. You may look at Defendant's Exhibit U.

A. I can't recall whether he took any notes or not, but I assume, however, that he must have. As I recall the conversation, it was a conversation, you call it a meeting with him, but I recall having talked with him, but without reading it carefully I would not know the contents of the conversation or I would not remember it without having this document to refresh my memory.

Q. Would it help you to answer that question if you did look at the document more carefully?

The Court: The question whether he made any notes and whether this witness saw them and this arguing around about his recollection or what was said or done has no bearing on the thing whatsoever.

[fol. 982] Mr. Kelley: I think he has already answered the question, your Honor.

The Court: I think he has too. Proceed with your next question.

Mr. Deikman: Your Honor, I am through with this witness. That completes our examination.

The Court: What do you wish to say that you think you have established as to what you think you are entitled to on the basis of his testimony?

Mr. Deikman: The witness has testified that he assumes that on the various occasions on which he talked to the FBI Agent Zoeller that Mr. Zoeller took notes of those conversations. In addition to the witness's testimony concerning his assumption I think that the reports, themselves, indicate that notes were taken by Mr. Zoeller, and for that reason we feel that those notes properly fall within the definition of "statement" under Section 3500.

The Court: What basis? That is what I can't follow you on.

Mr. Deikman: That they were a contemporaneous recording of the witness's oral statement which was substantially verbatim. Now, the question is, what does "substantially verbatim" mean?

The Court: That is only one phase. Where is there any evidence whatsoever that they were even attempted to be verbatim, because there is no testimony, and this witness naturally doesn't know what were contained in the notes if they were made, and there is nothing to indicate they were taken verbatim or intended to be verbatim. That is the part I want to know.

Mr. Deikman: If the Government by submitting these statements which we do have and in view of the position of the Court that all documents submitted by the Government do fall within the definition of Section 3500 it follows that even the Government concedes that the reports which we have been provided under Section 3500 are substantially verbatim.

Obviously, they were based on notes. Those notes must be [fol. 983] even more substantially verbatim than these records which were made less contemporaneously with the witness's conversation. Now, that is our position, your Honor. I do not believe that we will argue it any further.

The Court: I do not think that position is tenable. Do you have any other basis that you think would make anything or identify anything in his testimony that would be properly producible either under 3500 or otherwise?

Mr. Deikman: Yes, your Honor. The witness has testified that the attorneys in the first Travis trial were always taking notes of his conversations with them, and he said that generally about all attorneys with whom he talked in preparation for his testimony. We take the position that that evidence is sufficient to establish that such notes were taken, that they were contemporaneously made, that they were substantially verbatim recitals of the witness's statement to the attorneys at that time. Your Honor, may I be permitted to reverse myself? There is just one area I would like to inquire of the witness further about. I forgot to ask him about his preparation for this trial.

The Court: All right, you may inquire.

Q. Previous to your—

The Court: I thought though he went into that, I am not going to say, but I think, I had the impression, somebody correct me very quickly, if somebody didn't testify that he talked to Mr. Kelley and Mr. Witt had a question in open court like that, and I gave him permission to ask that, and he said he didn't intend to pursue it. I have a further recollection that you asked him the question in the courtroom and I sustained the Government's objection on some basis or held it up, and then I came in Chambers, and I thought I said it would be all right to ask the question, and you said in view of what Mr. Kelley said in here you didn't think you would pursue it. We might as well have it for the record, and you can go ahead and ask him.

Q. Just previous to your testimony in this trial did you have occasion to discuss your testimony with any attorneys for the Government?

A. Yes.

[fol. 984] Q. Who were those attorneys?

A. Mr. Crandall is the only one.

Q. Mr. Crandall is the only one?

A. Yes.

Q. How long before the trial did you see Mr. Crandall?

Mr. Kelley: He has already testified to that I think.

Mr. Deikman: I don't believe he did, Mr. Kelley, but I think we will get at it more expeditiously if we let him answer the question.

A. I would say about a month before the trial.
Q. Where was that?
A. In Butte.
Q. Where in Butte?
A. At the Hotel Finlan.
Q. At Hotel what?
A. Finlan.
Q. And why—is that your residence?
A. No, that was Mr. Crandall's room.

The Court: What is the difference whether it was his residence or wasn't his residence?

Q. How long did you talk to Mr. Crandall on that occasion?

A. I should say about an hour one evening and perhaps a half hour the following evening. However, when I mention hours here I am referring to the overall meeting with Mr. Crandall, and we talked about many things that have nothing to do with the testimony in the Travis trial.

Q. In view of that answer how long would you estimate that you talked to him about your testimony in the Travis trial?

A. I could not say.

Q. Did you provide Mr. Crandall with anything in writing at that time?

A. I believe not.

Q. Did Mr. Crandall take notes of your conversations?

A. Now, if someone was to ask me now if you had taken any notes this morning it would be very difficult for me to answer. How can I answer that? I believe he took some notes. I just don't remember of him holding a pencil or pen.

Q. Did you have any further conversations with Mr. Crandall in preparation for your testimony in this trial other than in Butte?

A. Nothing in the nature of a formal meeting. Perhaps a question or two prior to the trial Mr. Crandall may have asked here in Denver.

Q. When did he ask you a question or two?

A. Oh, I believe a day or so after I got into Denver. I, [fol. 985] don't just recollect the evening that, or evenings that I talked to him.

Q. Where have you talked to him?

A. I believe at the office of Mr. Kelley.

Q. Was anyone else besides Mr. Crandall present at that time?

A. No.

Q. Was Mr. Crandall taking notes on those occasions or —strike that. Are you speaking of more than one occasion?

A. Well, I am not sure. I have been at one or two, perhaps even three times that we briefly referred to the subject for which I am in Denver, but I saw Mr. Crandall quite often during the last couple of weeks. We discuss other things.

Q. Just relating to your conversation with him concerning your testimony in this trial, how long would you say your conversations lasted altogether?

The Court: What do you mean by that? I can't understand any necessity for all of this detail or what it is developing or anything else.

Mr. Deikman: I won't ask it if your Honor objects to it.

Q. Did Mr. Crandall take notes on those occasions?

A. I suppose he did.

Mr. Deikman: I believe—

Q. Have you talked to Mr. Crandall concerning your testimony since your direct examination but before your cross examination?

Mr. Vincent: If your Honor please, the Government objects to that.

The Court: I do not see the purpose of that unless there was some statement made and his testimony on direct examination was the criterion of his statement under the statute.

Q. Are there any other occasions other than you have already mentioned in which you believe that United States Attorneys took notes of your conversations with them concerning your testimony in this trial, Mr. Mason?

The Court: I don't think you need to answer that. He has gone into every single instance specifically and all the way

[fol. 986] down the line, and I don't know how the question could be answered.

Mr. Deikman: That completes my examination.

Mr. Crandall: May the record show that he is excused, because he has to make arrangements to return?

The Court: I believe he is excused.

Mr. Deikman: It depends on how your Honor rules on an additional motion I wish to make.

The Court: Let's get rid first of this attorney's business. You were discussing that, and then you asked to examine Mr. Mason. Do you have anything further to say?

Mr. Deikman: Yes. On that let's get to that. The witness has testified that Mr. Crandall probably took notes—I am paraphrasing what he said; I cannot recall exactly what he said as his exact words, but I hope I am not being dishonest in saying that that is the effect of what he said. It is our contention that such notes fall within the definition of Section 3500 as to statements.

The Court: On the basis that they are substantially verbatim recordings of the conversation?

Mr. Deikman: Yes, your Honor.

The Court: Well, I do not think there is anything in the record that would support that contention with respect to these last matters or with respect to any of the conversations or conferences or whatever they may be called between the witness and various counsel for the Government at the time of these hearings or immediately preceding the hearings. I think it should be inferred and must be inferred that the matter of the testimony to be given was discussed and the attorneys made notes to assist them in conducting their examination of the witness. There is no indication to the Court that any of these attorneys attempted to sit down and write out in longhand verbatim what the witness said. If they desired to do that, they would have called in a stenographer or made some arrangements to take the testimony verbatim. I mean on the basis of any sound inference that I understand to be drawn it has [fol. 987] to be assumed that these were simply notes for the benefit of the attorney in conducting the examination of the witness, and under that theory they would not come under 3500 at all.

DENIAL OF MOTION FOR PRODUCTION OF STATEMENT RE INTERVIEWS BY MASON AND ATTORNEYS RE PREPARATION FOR TRIAL

In each and every instance I think it has been established that after the conference with the attorneys that there was no transcription of the attorneys' notes made or any record had been made, and, again, submitted to the witness for his approval or disapproval or for signature or anything else which, again, brands them clearly as not coming within 3500 under any theory. So, the position for production as it relates to any reported statements arising in any of these interviews with attorneys preparatory to the trial will be denied.

Mr. Deikman: In view of your Honor's ruling I would like to make another motion.

The Court: All right.

MOTION TO REQUIRE UNITED STATES ATTORNEYS TO MAKE AN INVESTIGATION OF THEIR FILES AND DENIAL THEREOF

Mr. Deikman: The defendant moves that the attorneys for the prosecution be required to make an investigation to determine whether there are in their files or the files of any other United States Attorney or attorney for the Government any materials which were substantially verbatim recitals of the witness's oral statements made contemporaneously with his making of such statement.

The Court: I see no basis whatever for that request, and it will be denied.

Mr. Kelley: May it please the Court, in view of some of the statements of Mr. Deikman as to obvious assumptions or conclusions that could be drawn from what he developed on the questions of the agents' reports and their notes and so forth I would like to say that from the testimony as it relates to the documents which have been presented and offered in evidence that it is a fair assumption to draw from the comparison of the testimony and the notes that the agent either made fragmentary notes or relied entirely on his memory, and I want it also to appear in the record that the Government represents that it has produced all that it can find after a diligent search of anything that

even remotely comes within 3500, and on the basis of the [fol. 988] position that the Court has taken as to the interpretation of the Court's function in connection with 3500 we feel that we have produced many things which are not statements under 3500.

The Court: Do you have any other motions to make?

Mr. Deikman: In view of Mr. Kelley's remarks I would like to ask Mr. Kelley whether he has made a complete investigation, or any attorney for the prosecution has made a complete investigation to determine whether or not there are any substantially verbatim recitals made by the witness to attorneys for the Government which were contemporaneously written down or recorded.

Mr. Kelley: I would make this statement to counsel: that there are no statements that have not been produced that would come within 3500 by any interpretation.

Mr. Deikman: I feel that the answer was not directly responsive to my question.

The Court: Let's go into something else. Do you have any motions to make? Let's get this disposed of.

Mr. Witt: Yes. Mr. Deikman is beginning to refer to our motion with respect to grand jury testimony which I will make, and, of course, it is the same motion as with respect to the other witnesses, that is, Mr. Mason's grand jury testimony on both occasions in this court with respect to Travis being produced either directly to the defense or, in the alternative, the Court to determine whether that testimony contains any contradictions of Mr. Mason's testimony in open court. Just these few words, I hope they will be few, in support of that motion in connection with this witness: One, we think the testimony of the witness in open court definitely demonstrates contradictions with respect to his relations with the FBI in general when he talked to them about Travis and in general a good many contradictions. Two, the record in open court together with the exhibits indicates that conclusively from Mr. Mason's own testimony together with the interest that he has been mistaken in the past about some of his testimony. I refer specifically to his testimony about his conversation with the defendant in July of 1949 about the defendant's resignation from the Communist Party. Before the NLRB

[fol. 989] Mr. Mason testified that that conversation took place during the course of an Executive Board meeting in Chicago. When he testified against the defendant the first time on the first trial he changed that and said that conversation took place in Denver. In between—I should say that he testified before the NLRB in May of 1954 and on the first trial against the defendant in December, 1955—in between on August 24, 1954, according to one of the statements furnished to the defense by the prosecution under Section 3500 Mr. Mason had advised the FBI in Butte that the testimony he had given about the city where that conversation took place had been wrong. As a result of that he corrected it when he testified against the defendant on the first trial. Finally, and connected with that and cutting across all of this witness's testimony is the statement he made to the FBI contained in Defendant's Exhibit P I think it is for identification, not that it matters because this particular item is in evidence, the item which begins at the bottom of our page 35 and runs to the top of 36 whch is now in the record, that is that short paragraph, and I would like to read it into the record at this point: "Mason advised that from the time of the 1946 IUMM&SW elections Travis and he became more intimately acquainted. In all conversations Travis probably out of respect for Mason's knowledge of the Union and the Party and its program always spoke freely about his being a Party leader, about Party forces in the Union, and the Party program in general. Mason states he is unable to enlarge on this information as to dates, places or specific individuals or incidents."

Mr. Mason said that to Agents Kreitner and Zoeller on June 7, 1955, before he testified either on the first trial against this defendant or this trial. Despite that statement of his that he is unable to fix dates and places and names of specific individuals in open court on the witness stand all of his testimony about his conversations with Travis fix more or less exact places, dates, and individuals, and that is a contradiction which goes to the very heart of Mr. Mason's entire testimony.

Mr. Kelley: But there is no contradiction shown between what he has testified to in the court room and what he tes-

tified to before the grand jury, and that is where the contradiction must appear, and we must have evidence of some third party that he made a statement that he testified differently before the grand jury than he has testified in [fol. 990] court, or it must be one of those special types of cases. As to the language thing that Mr. Witt mentioned, on these dates where there was any question about the accuracy of the witness's testimony Mr. Witt has presented vouchers to refresh his memory and correct it so that it doesn't seem to me there is any issue on it in the first place. But be that as it may, and I might say that the Government doesn't agree with the assumptions of Mr. Witt in his summarizing the matter, except that as to the location of a certain conversation which he testified to before the NLRB and which he has since corrected, and there have been no challenges to the accuracy of the conversation, so that we say that there is no foundation laid for the production of any grand jury testimony.

Mr. Witt: I won't waste time answering Mr. Kelley. I think I have said all I need to say in the past on this business about the secrecy of the grand jury testimony. Mr. Kelley says we haven't shown any contradiction of the grand jury testimony. If we did, we would not be making this motion. We would have it. Mr. Kelley has that testimony. We don't. So, Mr. Kelley is making a fetish of the veil of secrecy over the virginity of grand jury testimony, and the time will come when that virginity will come to an end the same way the time has come when the virginity of FBI documents finally came to an end.

The Court: This question has been gone over in connection with similar motions made relative to the witness's Eckert and Garner, and we have discussed the law in connection with the motions in those cases as appeared in the record, and for the reasons indicated the Court feels that there is no purpose that would be accomplished by elaborating on the matter at this time, and the motion will be denied on the same basis I have denied the motions for production of grand jury testimony and minutes as to these other witnesses. That excuses Mr. Mason, doesn't it?

Mr. Kelley: Yes, Mr. Mason should be excused from further attendance.

The Court: All right.

[fol. 991] Afternoon Session

In Open Court

The Court: Mr. Kelley.

Mr. Kelley: May it please the Court, the Government has completed the presentation of its testimony on its case in chief and rests at this time.

In Chambers

The Court: What is it you wish to take up at this time?

Motion to Strike Testimony of Eckert and Denial Thereof

Mr. Witt: At this time, if the Court please, we move to strike the testimony by the witness Eckert about his attendance at schools in this country and in Moscow and the testimony of the witness Eckert on the so-called can't-resign policy of the Communist Party. Eckert's testimony about his attendance at Party classes and schools appears on page 80, and his testimony about the can't resign policy appears on page 301. That is the motion.

The Court: What is the position of the Government about their motion to strike?

Mr. Kelley: Well, our first position is that, your Honor, the matter was argued out in Chambers and the Court ruled on it. As to the school business it has been argued a couple of times

The Court: That was kind of my impression. There was something about a continuing motion to strike testimony that wasn't connected up, however, that they may be thinking about. My own memory is, and, of course, the record will disclose what happened, we had a full discussion about that before he was permitted to answer this question about what the policy with respect to resignation was.

Mr. Kelley: Yes, I have that. It was on page 297. You stated that, "I have reached a conclusion that the Govern-

ment may be permitted to inquire about laying any additional foundation as to whether the witness is acquainted with the policy with respect to this matter, and then if he states affirmatively that he was—I think he already has gone [fol. 992] that far—that he may then be asked what the policy was, and I think also that the record might show that the defense may, of course, have a continuing objection to this line of testimony, and they have, I think, objected very specifically to this particular question; but, I want the record fully protected so there will be no question about their objections."

The Court: I assume that part I cited about continuing objection it is a matter for keeping the record straight, and I would not want there to be any confusion in the record that they had proceeded with due diligence to ass... the motion.

Mr. Witt: We did, no question about it, have long colloquy about it particularly Mr. Kelley's agreement and the Court's statement about the agreement with us that this testimony has to be connected personally with the defendant, and then Mr. Kelley said it would be and specifically referred to the fact that it would be connected up by the witness Horie at which point I said, if I recollect his testimony, unless he changed it or would change it now, it would not be connected up.

Then at page 295, two pages before Mr. Kelley referred to the record, he referred to page 297, the Court made the customary statement about the prosecution not being able to put in its case at one time so this is subject to connection. That will be found in the one full paragraph beginning just about the middle of page 295.

The Court: Did that relate to this particular testimony?

Mr. Witt: Yes, sir. That is after the discussion we had in the course of which we all agreed that, if there was such a policy of the Communist Party according to the witness Eckert, it could not be imputed to the defendant under the Fifth Amendment and under the cases and that it had to be connected personally with the defendant the result of which Mr. Kelley made the statement that it would be connected up mentioning, as I said, specifically the witness Horie at which time I said what I already said I said about it.

Then in connection with this whole problem, as I was beginning to say, the Court said at page 295, as follows: "Now, we all know that you cannot prove the whole case by one witness."

[fol. 993] Mr. Kelley: What page are you on now?

Mr. Witt: 295. "The United States said that there will be evidence presented in the course of the trial that will show the connection, as they call it, or the fact from which knowledge can be inferred, and also, of course, of conduct which would amount to subscribing to the principle and following the principle, in fact."

And in the next paragraph your Honor went on to say, "Again I think that the objection will have to be overruled at this time on that basis." Et cetera, et cetera.

Mr. Kelley: Well, as to that I would say this: that I don't see the point. The place you said I made the statement about Horie—

Mr. Witt: That is page 259, Mr. Kelley.

Mr. Kelley: I would like to see what we were talking about.

Mr. Witt: We were talking about what I said we were talking about. You begin at the bottom of page 258, Mr. Kelley.

Mr. Kelley: At that point the Court was under the impression that before we could put that testimony in that we would have to show that there was no constitutional provision or other written policy in connection with it. Now, I think maybe I did mention something that the witness Horie might say, but I want to call the Court's attention to this fact: I think our only obligation was to connect it up. We didn't use the wit ess Horie, but we used the witness Gardner, and the witness Gardner had a long discussion with Mr. Travis about this matter of resigning and his particular so-called resignation from the Party and what a mistake it was and how it played into the enemies' hands, so that it was brought to the attention of the defendant.

Also, all of the evidence shows that Mr. Travis was active as a Communist in his union operations all during the period covered by our testimony from '48 up through at least '53, I forget how far we brought it but some place up

[fol. 994] into '53. So that there is sufficient connection for the jury to weigh the thing, and the only thing I can see is that what Mr. Witt is talking about may go to the weight of the testimony but not to its admissibility but its propriety being in the case for the consideration of the jury.

There is one other thing that I should point out to the Court, and that is the witness Mason testified to the fact that Mr. Travis had discussed his resignation with the witness Mason and the fact that he had cleared that with Ben Gold and the Party people in New York which directly ties in and connects with the question of resignation.

Mr. Witt: I think this statement by counsel for the Government, the United States Attorney for this District, about the testimony of Gardner and Mason is incorrect. Your Honor, let's be clear what we are talking about. We are talking about the so-called can't-resign policy and not about Travis's resignation as such. Mr. Kelley is entirely mistaken in saying that either Gardner's testimony about his talk with Travis in 1951 or Mason's testimony about his talk with Travis in 1949 had to do with the can't-resign policy.

Here is Gardner's testimony. I won't go over it, your Honor. It is here, it runs over two pages about that occasion, 966 to 967. It has absolutely nothing to do with the policy of the Communist Party about not being able to resign.

As far as the conversation with Mason is concerned that too had nothing to do with the can't-resign policy. This is a criminal case after all so that the mere fact that the word "resignation" appears in some testimony doesn't permit an inference to say from that testimony that the can't-resign policy was being discussed. Taking Mr. Kelley's own statement as to what Mason said that Travis said, Mason said that Travis said he had cleared with Ben Gold and the boys in New York or the Party in New York, it really doesn't matter, he had cleared his resignation with them. If anything, that is testimony for the defense on the fact that Travis had actually resigned and that Ben Gold and the other boys or "Guys" or "Dolls" or whatever they were in New York had agreed he could

resign. They had not agreed to the policy that he could resign. It just doesn't add up. We will take it either way. [fol. 995] The Court: Well, of course, the matter really divides into two parts. I think there have been very extensive discussions about the whole thing as we have gone along. The first question in which the defendant moves to strike has to do with the witness Eckert attending schools I think in Moscow, and I think he mentioned some other schools, and he answered something to the effect that he had. I think that is about the size of the first question.

Now, you will recall in connection with that that at the time—I think the record brings this out—there had been advance objections that might be called on the part of the defense about going into the details of his training and the things that were taught and what his activities were at these schools on the basis that that testimony might be prejudicial and inflammatory and things of that sort. I think it was rather on that basis that the Government did not go further into the question of these schools.

In the first trial I understand not only his testimony about attending the schools had been admitted but also that in considerable detail there had been testimony relating to his activities at the school and so forth. That question, of course, was asked as a basis for establishing foundation for the asking of the question about policy, and, so, there is no connecting up in the sense that we have been talking about with respect to that question at all, because, if it is admissible at all, it is admissible as a question of foundation for the purpose of attributing to the witness the right to express an opinion because of his familiarity with the structure and organization of the Party and so forth.

The record will also show that the Court in the first instance was of the opinion that possibly this matter of what we have been calling policy relative to resignation as might be testified to was a matter of direct testimony as distinguished from expert testimony, but as the case proceeded I think the record will show that I think the Court concluded that it was wrong in that theory, and then I decided as was indicated on page, whatever page it was Mr. Kelley just read, page 297, is that right?

Mr. Kelley: Yes.

[fol. 996] The Court: On page 297 of the record that the Court felt that there had been sufficient foundation laid to enable the witness to answer the question in regard to the policy of resignation as an expert and permitted the question to be answered.

Then, of course, comes the problem that Mr. Witt has been talking about of whether there is anything in the record to connect that up with Mr. Travis. Without attempting to detail the evidence or state critically what the testimony was it seems to me generally that there is no question that the evidence showed that Mr. Travis, I think it is admitted, as a matter of fact, up until the time of this question of resignation was a member of the Communist Party. It also appears from the Government's evidence that he associated very frequently and often with people whom the Government witnesses have identified as being members of the Communist Party with respect to policies of that Party in the Union and otherwise generally.

Then, coming to the testimony of Mason and Gardner it seems to me, if that evidence is considered along with all the other evidence about Travis's association with the Communist Party, that an inference could be drawn from the evidence that he did know of this policy of resignation and that was inherent to the discussions. Now, on the other hand, it may be argued that he didn't. Mr. Witt just pointed out I think in his statement that it might possibly be inferred that he had cleared it in the sense of receiving permission to resign or something of that sort. But with the evidence as it is I think that is a question purely and wholly for the jury. So, my conclusion is that the motion to strike will have to be denied.

Motion for Mistrial and Denial Thereof

Mr. Witt: All right, your Honor, at this time we move for a mistrial because of this same testimony by Eckert, one, his testimony about his attendance at schools in this country and in Moscow because in addition to the fact that that is not connected up with the can't-resign policy in terms of the defendant it is clear on the record that that testimony wasn't necessary to qualify the witness as an

expert and especially in view of the way Mr. Kelley eventually put his question to him which was different than on the first trial where he was permitted to give an answer to the question as an expert and where the question comprehended attendance at schools unlike the question in this case, and, since we think we are right about the failure to [fol. 997] connect Mr. Eckert's answer to the question about the can't-resign policy with the defendant, we think that answer together with Eckert's testimony about his attendance at schools makes it impossible for this jury to decide this case on the issues and on the merits and on admissible evidence.

The Court: Well, it is my impression, I may be wrong about that, that the motion for mistrial was made and denied once before. I may be entirely wrong. So there may be no question in the record it may be shown now that the motion for mistrial on the ground Mr. Witt just stated is denied.

I think further I should add to what I said for the record which was suggested by the thing Mr. Witt just mentioned, as I understand, at the first trial not only was evidence with respect to this attendance at the school in Moscow admitted in evidence but that the Government went into some detail with respect to things that transpired there or what the witness was taught there and then was permitted to ask the question from the witness as an expert as to the policy of the Party with respect to resignation.

I think in addition to that there also in that trial was permitted an answer by the witness with respect to some other matters of policy that were not gone into here. The point I am making is that that whole matter and more was contained in the first trial. The Court of Appeals had the record from the first trial, and I am inclined to think, if they had felt there was anything prejudicial in that evidence or in that procedure, that some mention would have been made in the opinion concerning the matter, because they reversed the case and remanded it for new trial, and some of the particulars that were mentioned, obviously the comments were for the guidance of the court on retrial, and I can't help but think that they would have said

something about it in their opinion, which it is my impression it doesn't mention the matter, is that correct?

Mr. Kelley: That is my recollection, your Honor.

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[fol. 1019] COLLOQUY RE OFFER TO STIPULATE THAT DEFENDANT TRAVIS WAS A MEMBER OF THE COMMUNIST PARTY UNTIL AUGUST, 1949

The Court: That disposes of one thing, and the other thing that I remember that was held over from the last conference we had which I think was on Friday was with respect to the desire of the defense to announce at the opening of their case that they wish to admit Mr. Travis was a member of the Communist Party up to a certain time, I don't recall the exact date. The Government wanted to think the matter over over the weekend. What is your conclusion now?

Mr. Kelley: Your Honor, a search was made to find some law on the proposition, and we didn't find any specifically on the point. The Court will recall that on a number of occasions statements of counsel have been made and the Court has advised the Jury that no statement of counsel should be considered as evidence and that they should disregard statements of counsel. It seems to me that this might fall in the same category. Mr. Witt has stated on Friday, as I recall, that he didn't or wasn't making the statement for the purpose of asking for any specific instruction or for any other purpose than to be able to argue his resignation in 1949. Wasn't that substantially it?

Mr. Witt: No, not quite. I had better state it myself so there is no doubt. It is a rather touchy point, and I think the record ought to be clear on it. The record now shows, if the Court please, that our letter, the defense letter to Mr. Kelley, I forget the date of it, I don't have it here, it doesn't matter, a few days before the trial—Mr. Deikman says the date of it was January 10, 1958—offering to stipulate that the defendant was a member of the Communist Party until August, 1949, is a part of the record, it became part of the record in connection with our objection to all of the testimony of Eckert as being remote, and in

connection with that argument we argued that the only reason for getting it in in light of our offer to stipulate about Travis's past membership was to confuse the issues and to prejudice the Jury. So, it is part of the record on that legal issue, the admissibility of all of Eckert's testimony. However, it is not in any way before the Jury except insofar as I said in our opening statement that we don't contest Travis's membership before August of '49.

Now, we want to get the matter before the Jury now not to further strengthen our argument against the admissibility of Eckert's testimony. The record is made on that. [fol. 1020] We want to get it before the Jury now so that we can say in our summation without using the letter embodying the offer to stipulate itself, so that we can simply argue to the Jury that as far as we are concerned it has never been an issue in this case, that is, Travis's membership until August, 1949.

The Court: What do you wish to say to the Jury, you mean right at the start of your case?

Mr. Witt: Yes, right now.

The Court: Before you start to offer your evidence you want to say what?

Mr. Witt: We want to say that as we told them in our opening statement in this trial we have not contested the fact that Travis was a member of the Communist Party in August, 1949, and that in fact before the trial began we offered to stipulate with the Government as to that item.

Mr. Kelley: The Government's feeling on this, your Honor, in the first place, the statement partakes of the nature of evidence from the defendant on a particular point, and there is no opportunity for the Government to cross-examine. We objected originally to the offer to stipulate on the point, because the mere admission of membership doesn't show the degree to which the defendant adhered to the policies and programs of the Party and for the same reason this statement made by counsel is in effect putting in evidence a point without giving the Government an opportunity to cross-examine. It seems to me it is just a mere statement of counsel which should not be considered as evidence nor given the right to argue the point to the Jury.

The Court: I do not think that it is evidence in that sense. I do not think anyone contends that it is evidence, but I do not see any reason why the defense cannot say they do not contest the fact that he was a member of the Party up until this period they are talking about. I do question whether you ought to say anything about your attempt to stipulate with the Government on the thing.

Mr. Witt: May I say something on that if I may and answer Mr. Kelley?

The Court: Yes.

[fol. 1021] Mr. Witt: This suggestion of ours is made in an attempt to avoid a situation which as lawyers in this case Mr. Deikman and I do not like, that is, putting Mr. Kelley on the stand.

The Court: Mr. Kelley?

Mr. Witt: Yes, to prove by him that he did receive this letter from defense counsel.

The Court: I do not see the pertinency of that. That is what I do not follow. I am agreeing with you, I see no objection to your saying that you do not contest the point, but I do not know that there is any proper place to say that they refused to stipulate. They have a right to offer their evidence, and they have done it. If it was a situation, as I pointed out the other day, where the defendant offers or stipulated to something as a matter of fact and then they had offered no evidence and later it was contended that the admission or whatever you want to call it was not binding on the defendant, you would have a problem, but that is not the situation here. The Government has offered all of their proof, and it simply, they wanted to substantiate their opening statement to say that, "We still could not contest the fact that Mr. Travis was a member of the Party during the period that they have indicated." I see no objection to that. But I doubt whether it is proper to say that they offered to stipulate, because the Government would be obliged to accept that stipulation, and the implication might be that the Government did something to prolong the case or something. I do not know exactly what.

Mr. Witt: Well, your Honor, let me be a little more specific and spell out my thinking. First, I was wanting to say another word in answer to Mr. Kelley with reference

to his argument that they could not cross-examine. If we are right technically, leaving aside the unseemliness of calling Mr. Kelley to the stand, technically, we think we can call Mr. Kelley to the stand and ask him whether he received this letter offering to stipulate. Then, with respect to cross-examination that is open to the Government. They can cross-examine Mr. Kelley or they can put in rebuttal evidence if they can figure out something to do. We do not take away that right.

Now, since as the record stands especially in view of Mr. Kelley's statement that they turned down the offer to [fol. 1022] stipulate in order to show what kind of a Communist, Travis was, however Mr. Kelley put it, they have tried to do that through the witness Eckert, and we have a right to answer that in our defense, and one of the ways we think we can do it and have the right to do it is by this offer to stipulate.

The Court: Well, I am not so sure, I wonder if anybody has looked at the record, my own feeling is that the Jury already has been told about their willingness to stipulate about that fact, because my memory is that in the court—I may be entirely mistaken—Mr. Witt or Mr. Deikman, I don't recall which one, objected to the testimony of Eckert after they offered to make the stipulation I think right in the courtroom.

Mr. Witt: Even if that were so, I think your recollection may be right, I may have said something before the Jury when we objected to Eckert's testimony at the very beginning and before we went into Chambers, still, what I said isn't in evidence especially in light of the fact that your Honor has reminded the Jury on more than one occasion that statements of counsel are not evidence.

The Court: I do not believe it is evidence frankly.

Mr. Witt: That is the issue.

The Court: I think it comes in this category: I think, for instance, if you take a murder case, just to take an outside analogy, the Government started to offer proof about the acquisition of a gun by the defendant with the idea that he had gone down there a few minutes before the shooting and had gone into some pawnshop or some place else and bought the gun in an attempt to identify the defen-

dant as the owner of the gun involved, I do not know any reason in the world the defense could not get up and say, "We concede that the defendant here had that gun," and the Government will say, "We are going ahead with our proof anyway so there won't be any mistake about the sufficiency of the proof," and you go ahead with the proof.

Mr. Witt: That doesn't meet my argument, your Honor, and perhaps I didn't make it clear when we talked about it the other day. It is not merely the admission of a material fact or any kind of a fact that the Government is seeking to prove. In addition, it is important to us, we think it is [fol. 1023] for the Jury to know not only that we admit it but that we volunteered, we offer the Government an opportunity to take it out of the case and that the Government rejected it for its own purposes. We think that adds an element.

The Court: I do not think it is evidence, but, on the other hand, I am rather sure it is not evidence, because if you came to the question of sufficiency of proof, say, on the thing, I do not think the Government could come in and say, "Well, here they admit it in open court that Mr. Travis was a member of the Party during this period," I do not think that would suffice in the way of proof.

Mr. Witt: Not now, not on the basis of this record.

The Court: Any time, because then you would immediately raise the question of whether the admission, and I am speaking strictly in terms of what I call admissions, I doubt if the admission would be binding on Mr. Travis. On the other hand, I cannot see any objection to their saying, "We do not contest the fact or offer no evidence in opposition to it. In fact, we advised the United States Attorney that we concede he was a member of the Party." I do not see an objection to an argument along that line.

Mr. Kelley: I cannot see that he should be permitted to get before the Jury any more than he has, if he has already, the fact that he offered to stipulate. That has no place before the Jury as to what they offered to do and we didn't agree to. Then, Mr. Witt was talking about the Government would have the right to cross-examine me if they put me on the stand answering—

The Court: I do not think your evidence would be admissible. I am very frank to say that right now. What I can't get away from is this: We are faced with a practical situation. I cannot conceive quite of a situation where, take my murder case for analogy, if they would get up and say, "Here, you heard an awful lot of evidence, you heard five or six witnesses come in here and testify about the ownership of this gun, we don't dispute the defendant owned the gun all the time. We offered to—we agreed to it here in open court, and notwithstanding that the United States Attorney saw fit to go ahead and offer all of this evidence." That is all it amounts to. I do not think it is [fol. 1024] evidence or anything else. But I think anybody's legitimate argument—

Mr. Witt: It is a little more than your Honor said we want to do.

Mr. Kelley: Getting back to this question I raised about the right to cross-examine, when Mr. Witt makes the statement that Mr. Travis admits that he was a member of the Communist Party up until August, 1949, we have no opportunity to cross-examine him on the basis of that proof in this case if that is what he wants to call it.

Mr. Witt: Cross-examine whom?

Mr. Kelley: Cross-examine the person, the person for whom the admission is made. You are making that admission on behalf of Mr. Travis. Now, the reason it can't be evidence or can't be considered as evidence in any way is because we have no right to go into the question of his membership which you in effect are saying he was a member until '49 but he terminated his membership at that time.

Mr. Witt: You have no right to cross-examine Mr. Travis on that. He had nothing to do with that except he approved of his counsel in this case making that offer to stipulate, period. This is a legal matter and not anything that the defendant from an evidentiary point of view was enveloped in.

Mr. Kelley: That is the answer to your proposition of putting it before the Jury. It is a legal proposition that was terminated early in the case when you made the offer and we refused it.

The Court: What is there in the world to stop them from getting up and arguing to the Jury that, "Here, we do not contest the fact at all (leave aside the use of the word "admission" in the technical sense) we do not contest that Mr. Travis was a member of the Party up until such and such a time. In fact, as you have heard here before we offered and agreed that the record might so show." Now, where is there anything wrong with that?

Mr. Kelley: Well, the things I have said, your Honor.

[fol. 1025] The Court: How would you escape it?

Mr. Kelley: I would go along with letting him make the statement that the defendant admits that he was a Communist until August 15, 1949, but to add that he offered to stipulate with the Government to that fact and the Government refused, I do not think that has any place for consideration with the Jury.

The Court: It is getting down to a fine point about the Government refusing. I do not think that is proper, because that involves you might say a question of agreement or some implication of the refusal of the Government to agree, but I cannot see any reason they cannot say that they do not contest it—I do not like the word "admit"—that they do not contest that fact at all, in fact, that they offer to agree to that or offer to admit that but without saying you refused it. That is the part I think might be objectionable, because the implication is you have done something that changed the situation. I think they can say they offered to admit that fact or something like that and just go from there.

Mr. Kelley: I think, if he makes that statement, I should be allowed to get into the record at that time the fact that we didn't agree to it for the reason that it didn't go far enough.

The Court: Maybe then, if you are going to get into that, he would be entitled to say in the first place, "You didn't agree to it," and then, if you wanted to get up and say that, I don't see any objection to it.

Mr. Witt: I object to that. That is legal argument. We want to prove a fact.

The Court: But I will agree with you that this is evidence. That is what is bothering me.

Mr. Witt: We do not intend to get before the Jury as to why we did it. That is legal argument. We just want to get the evidence before the Jury, and, therefore, we want the cherry on the sundae your Honor isn't agreeing to, we want to be able to tell the Jury as a matter of evidence or as a matter of agreement in open court that our offer to agree to this before trial was refused. That is the cherry. [fol. 1026] We don't care about the sundae without the cherry.

The Court: I do not believe you can go that far. I believe you can get up and tell the Jury that you do not contest the fact and the fact you offered to agree to, not agree, offered to admit it, and then proceed right now but say that the Government has offered proof on the thing or something like that. In other words, what I do not think is proper in the way of comment is the refusal of the Government to agree. By analogy I would suggest something like some of these other matters that come up, like the one I just talked about this morning: If the Government came in Chambers here and said on this character witness on this cross examination, "We are not going to ask about this contempt business we asked about before," why, I do not think a subject like that is proper for comment before the Jury, because it is not a part of the transaction at all, and I believe it is legitimate for you to say, "As I said in my opening statement, we do not contest this fact, and, in fact, we offer to admit it," but say nothing about the Government's refusal.

Mr. Witt: All right, we get your Honor's position, but we want to make our record on it that we will go as far as your Honor has ruled we may go but we want the record to show that we object to your Honor's ruling that we may not show by evidence or we may not state in open court that the Government refused our offer to agree.

The Court: I do not think you could show by evidence at all that you made the offer or they refused it in that sense. I am rather sure talking about the effect of it, the practical effect, and I may be mistaken, but I think the Jury have practically been told the same thing already as a matter of fact. My memory is rather definite, and sometimes I am badly mistaken, that when they objected in open court the

effect of it was to say, "Here, we are willing to concede that this man was a member of the Party at this period," and that the Government decided to go ahead and offer their evidence because they objected to Mr. Eckert's testimony I am rather sure in open court to start with.

Mr. Witt: I am rather sure, to say something about what the Court just said, I am quite sure that neither Mr. Deikman nor I at any point referred to the fact that we would offer to stipulate as to this man's position.

[fol. 1027] The Court: I do not think it is before the Jury. I do not think that ought to be before the Jury.

Mr. Witt: Then I misunderstood you. I object to that too. We think we should be entitled to say or to show, one, that we agree that Travis was a member before August, 1949, two, that before trial we offered to stipulate as to that, and, three, that the Government rejected the offer to stipulate.

The Court: On that the Court feels that would not be proper to talk about the stipulation or offer evidence about the stipulation.

Mr. Kelley: What they are trying to do, your Honor, is to have this proceeding that occurred at the start of the trial become evidentiary in the case, and it has no evidentiary value at all.

The Court: I have held this, they could not offer evidence on it and that they should not say anything before the Jury about this offer to stipulate and your refusal to stipulate. I still think they can say they offered to admit he was without saying anything about your position on the thing at all.

Mr. Witt: I do not understand your Honor.

Mr. Kelley: If they attempt to state what our position was, I am sure that the Court would recognize we would have a right to amplify it and make it clear what our position was.

The Court: It is going to be largely a question of argument anyway that you are both going to have to be talking about.

Mr. Kelley: Yes.

The Court: I think they have a right as he did in his opening statement to say that they do not contest this phase of the case. They could do that in any criminal case. They

could do that with respect to anything. If you had an embezzlement case or anything else, you could say, "We do not question the amount of the shortage here at all," the defense could say, "But we say so and so. In fact, we are willing to admit that the shortage was so much," and then go from there into other aspects of the case, but I agree with you [fol. 1028] they should not say, "We offered to stipulate to it and the Government would not accept the stipulation."

Mr. Witt: I am having difficulty following you. It seems to me you keep saying two different things, with all due respect. I am persisting, because I am confused, and maybe it is my fault. At one time you say we can't refer to our offer to stipulate nor the Government's refusal. Then, another time, you just said it again, I think that is the second time, you say that we can say not only that we admit it but that we offered to admit it, and I am confused as to what is your Honor's ruling.

The Court: Well, I think you had better leave out the word "offered". The trouble is, we are using the word "offered" in two different senses, that you are using it in a technical sense, and I didn't mean to imply it that way. I think it should be that you admit he was, that you do not contest it.

Mr. Witt: I do not want to take more of your Honor's time on it. I prefer your Honor now make the statement in haec verba that you are going to make and will make such as you rule we may make, and then once you state that for the record in haec verba we will state our objection to it and why we think it is improper, because I think it is confused up to this point.

The Court: I do not agree it is confusing. As a matter of fact, I want to look at the record, I think the whole thing is in the record.

Mr. Witt: I am confused. It may be clear to you.

The Court: I want to be sure that I am not looking at an in-Chambers conference here rather than in open court, I think this happened in open court. It is on page 40 of the transcript. Here is what Mr. Witt said—as I say, I do not think this is evidence, this is when they were talking about, this is when the objection came in to the testimony about Mr. Eckert attending these schools, and Mr. Witt on page

41 said: "Your Honor, it appears already from the testimony of this witness (that is Eckert) that he left the Party in 1948. The charges in this case relate to the years 1951 and 1952, and, therefore, we object to any testimony from this witness about his biography or about the Communist Party covering the period from 1931 to 1948 on the ground [fol. 1029] of remoteness. Secondly (and this is the part), as your Honor heard me say in my opening statement, we have offered the prosecution a stipulation to the effect that the defendant was a member of the Communist Party during the period until 1949. The only relevant testimony that this witness can possibly give about Travis, and, if he were asked, he would say he never spoke to Travis or had anything to do with him after 1948 after this witness says he left the Communist Party, the only testimony this witness could give would go to the period from 1931 to 1948. Now, we offered that stipulation on this occasion, your Honor, even though we didn't on the first occasion, because we weren't then aware of what kind of a case the Government would make when we went to trial the first time, but now that we know we offered this stipulation in order to remove any possible excuse for testimony from this witness or any other witness about Travis's membership in the Communist Party before 1949. Now, in light of our offer to stipulate we can see no possible reason for testimony from this witness about Travis covering the period from 1931 to 1948 or whenever it is except the prosecution's anxiety to inject prejudicial, inflammatory testimony into this record, and to seek to influence the Jury improperly."

And then there is some discussion here, and then I say that, "I understand his position is that there is no controversy in the case under their admissions here with respect to the situation prior to 1949. Is that what I understand?" Mr. Witt says, "Exactly." And then you say, "That is his position, your Honor, but—" And then Mr. Witt says, "I have several other branches to my argument I would like to conclude."

Mr. Kelley: May it please the Court, in considering this matter, now, first, the statement made by Mr. Witt there is merely an objection which doesn't partake of evidence.

The Court: It is not evidence. This is not evidence at all, but I am wondering where there can be a limitation put on it for argument, is what the question is. It is not evidence.

Mr. Kelley: That is my point.

The Court: I am satisfied of that.

Mr. Kelley: I want to point this out: In your analogies [fol. 1030] you have referred to this matter of the admission of the purchase of a gun, that is a fact that is established. We do not establish a fact in this case in the same way. We have to show, we have to establish a status, the status of being a member or affiliated with the Communist Party prior to the signing of the affidavit or affidavits and the continuation of that status, so, what he has attempted to do by his statement is to take away part of a fact, and he is not admitting a whole fact, but he is attempting to take away a part of a fact.

The Court: I do not see how there is a possibility of escape, or I do not see how there could be a limitation to the argument on the thing. The Jury has already been told for whatever it is worth what they have offered to do and all about it, and I still think that the way to handle it, I think I will sustain your position that they cannot see that the Government refused to do that. I think that throws another implication into it just as I said a moment ago, but up to that I think they can have a free hand and mention what the situation was.

Mr. Witt: Including our offer to stipulate.

Mr. Kelley: If you do that, we are going to object.

The Court: The Jury knows, Mr. Kelley, I might add, you mentioned in the course of this discussion before the Jury you say: "The Government's position is this: (that is when they offered to stipulate) it is not for the defense to suggest to the Government how they put on their case." And then you say: "We have the same issue originally in the case in the first instance except they didn't make the offer to stipulate. Now, they don't offer to stipulate everything we put in by our witnesses. Now, the Government's, one of the rules, and there is an instruction in the case on it, relates to a state of mind or a condition which the Government shows to exist prior to the act which constitutes the

crime, and we show that it exists and the extent to which it exists." And then you go on to say, "All right (there is a discussion there) a fact, and we have to prove that he was a Communist during the periods alleged in the indictment. Well, this is not the kind of a case where you can go down to the City Hall and find out that he is registered as a Communist and prove that he was a Communist on that date, and the reason we go into the prior, part of the reason we go into this prior history is to show the extent to [fol. 1031] which he adhered to the Communist Party and to show and to convince the Jury that the condition continued all during this period of the indictment." You say further, "Then in addition to that, your Honor, this witness is qualified as an expert," and so forth.

I think in the argument you can argue the same thing they did there, and they can argue their side, and it is not evidence, that is a sure thing.

Mr. Kelley: That is the reason it seems to me it is improper to interject it into the case. The only thing that should go to the Jury is evidence.

The Court: How could it be avoided? Independent of this discussion now how could you say to them, "We don't contest the fact that Mr. Travis was a Communist up to certain time," how can you say that to the Jury when the Jury knows already that they offered to stipulate that he was a member of the Communist Party?

Mr. Kelley: Of course, that was three weeks ago.

Mr. Witt: That's right.

Mr. Kelley: Now, let's carry this thing out. Mr. Witt gets up and makes this statement, now, on rebuttal can I get up as part of our rebuttal and say that Mr. Witt has made the statement that they offered to stipulate, we refused, and then put that in as part of our rebuttal?

The Court: It is not evidence. My own thinking is, it is really argument, the whole thing is really argument.

Mr. Kelley: Yes, I think it is too. You have a perfect right to do all of that in your closing argument. It is not time for argument at the start of your case.

Mr. Witt: Maybe we can agree if we have reached that point. I wanted to get it in evidence. I think this may solve it if I follow the colloquy. As I said, the only reason

we want to make the statement or get it in evidence is so that we can use it in our summation.

[fol. 1032] The Court: I think that is the answer. I think between the two of you we have got the answer, that you say nothing about the thing now at all, either one of you, and when it comes to your final summation either one of you, if you bring it up then, they can answer just as a matter of argument.

Mr. Witt: Do I understand, your Honor, that in our summation we can say not only that we admit it but that we offered to stipulate before trial and the prosecution refused? Then, we are satisfied. We want to get it in evidence.

The Court: Yes, I think they can do that, and you can answer in the argument to the Jury, not now in the way of evidence or anything else.

Mr. Kelley: I think I could answer it, but the thing is, putting something into the argument that is not a matter of evidence.

The Court: But it is a matter of the court proceedings. I do not see how you could do otherwise. I do not see how we could curtail it here. They offered to do it right out there before the Jury. Just take my gun case or anything else, I do not know how I could curtail them within the limits of reasonable argument to say, "Now, this happened before the Jury, and you can't say anything about it." I think the way to do it is exactly how you suggested, and I think you can do it that way. You can say that you offered to stipulate and that they would not stipulate, and then the Government can tell why they didn't stipulate.

Mr. Witt: Then, it means we will have to make the statement now in court based on the discussion in Chambers.

The Court: You won't have to say anything now, because this is all before the Jury right now. I just read it.

Mr. Witt: All right. So, you understand we can do it in summation if we decide to do it. Maybe we won't.

The Court: All right.

Mr. Kelley: Then, I think we should have, if you are going to permit it to be based on a statement and an objection, [fol. 1033] that there should be some instruction on the legal effect of this thing.

The Court: I do not see how you can give any instruction on the legal effect of it. It is not evidence in any sense of the word.

Mr. Kelley: That is the point. I think it ought to be specially pointed out that it is not evidence.

The Court: You have got to stand on your evidence.

Mr. Kelley: Yes.

The Court: And nothing they do can detract or add to that. You have got to convince the Jury on the basis of your evidence, not on the basis of any admission or anything else. If they want to comment on the evidence, is what it amounts to, that they are not contesting this right at all, in fact, they offered to stipulate, and you didn't see fit to agree to the stipulation, they can say that just as a matter of reference to what happened in the courtroom, then you can get up and say, "The reason we didn't, ladies and gentlemen—" and you can tell them anything you want to as a matter of argument.

Mr. Witt: Let me say this in answer to Mr. Kelley's suggestion as to a special instruction on this: If he persists in that position, then we want to make an offer of proof in open court on it, because, otherwise, this is selected from the summation for special treatment.

Mr. Kelley: An offer to prove what?

Mr. Witt: An offer to prove we wrote you a letter and you said "no".

The Court: I reiterate this is not evidence. It is in the same category of any basis of anything that happened. You are going to have to take your chances on that.

Mr. Witt: I want to say now that we have got to get a decisive position from Mr. Kelley on this special instruction, because, if your Honor is going to agree with him, if he does think that you should give a special instruction, we want to make an offer to prove in open court.

[fol. 1034] The Court: I do not see any instruction to be given. I can hear what the arguments are and decide what the instructions will be after the arguments, but I do not think, I want to make one thing very clear, I do not want this matter treated as a matter of evidence or any matter referred to as a matter of evidence. It is just exactly like if somebody gets up in an argument and says, "Here, you

heard me object to such and such an attempt, and I did it for such and such a reason," and the other side said, "The reason I took the position I did," that is just pure argument.

Mr. Witt: I understand.

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[fol. 1093] In Chambers

The Court: You may proceed.

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

Mr. Witt: Your Honor, at this time the defendant moves for a judgment of acquittal under Rule 29. May I say in that connection that in view of what we are going to stress we wish your Honor would consider ruling on this motion before the case goes to the jury instead of reserving ruling as your Honor, of course, is empowered to do. Also, we didn't come prepared this afternoon to argue insufficiency. Unless your Honor wants to hear arguments on sufficiency in which event we will need a little time to prepare that, we would like to defer that argument. We want the record to be clear that one of the grounds for the motion for acquittal is insufficiency.

Also, although I do not think it is necessary, but I have an impression, I can't think of the case or cases, that some case or cases hold that, if you are urging the application of the so-called perjury rules of evidence to the evidence in the case, that you should so state specifically in support of your motion for an acquittal. At this time we state that for the record, that in our opinion the Federal perjury rules apply to this case, so-called false statement case under Section 1001 in the same way as those rules apply to prosecutions under the perjury statute, itself. Your Honor will recall that that was an issue in the first case with respect to instructions, but we didn't make it in connection with a motion for acquittal in the first case. We do so now.

One other matter that we think we should mention specifically at this time, and it is in connection with this matter, that we think we are entitled to a motion for an acquittal now, the Government's proof is insufficient in a basic respect aside from the insufficiency of the evidence as such, and that is that the Government failed to prove the materiality of the alleged false statements. That is our motion.

Mr. Kelley: That is what the Court finds as a matter of law, isn't it?

Mr. Witt: Not as we view it. We are prepared to argue that at length, because we think the whole history of this case, the history of other cases of similar kind, particularly [fol. 1094] Gold and Jencks and the decided cases support our position, and we think, therefore, that your Honor should hear us on that issue.

The Court: That is what I want, I am getting at, and I am a little concerned on this phase of the thing on a time-table schedule. I would like to dispose of this motion this afternoon. As I also indicated before, of course, I want to give you an opportunity to be heard on it and hear what you have to say, because I wish to be advised on the thing, and you say now if you put that over until tomorrow—

Mr. Witt: I am sorry, I do not mean to interrupt you, but I interrupt you only because I apparently did not make myself clear. On this issue of materiality we are fully prepared right now, and we think your Honor should hear us right now. On insufficiency of evidence apart from the question of materiality I said we weren't prepared although, if your Honor insists, we could do that this afternoon too.

The Court: Let's proceed with your argument, and I would like to have the whole thing this afternoon.

Mr. Witt: You mean the sufficiency of evidence?

The Court: Yes.

Mr. Witt: May I do this then: I mentioned three particular phases of the argument in support of the motion for acquittal, insufficiency of evidence, the perjury rule, and materiality. I do not think the perjury rule is necessary to argue. I think your Honor is bound by the first case.

The Court: I do not think it is necessary to go into it.

Mr. Witt: All we are doing is making our record at this stage the way we did it on the first case. As far as the materiality is concerned I am prepared to go into that as fully as your Honor wants to right now. As far as insufficiency of evidence is concerned we would want a few minutes. So, I suggest this; since Mr. Kelley and ourselves apparently disagree on this materiality point, I would like to state our position on that and maybe Mr. Kelley and his associates will want a little time to answer us, and at the same time

we can be getting ready on the insufficiency of evidence point so we can dispose of that this afternoon.

[fol. 1095] The Court: Let's dispose of this first point, and then we can have a little recess. Was this involved in the first trial?

Mr. Kelley: At page 1459 Judge Breitenstein in his instruction says—

The Court: Let's hear what he has to say. You may proceed.

Mr. Witt: All right, your Honor, our position on that is as follows: that the cases hold that materiality under Section 1001 has to be proved by the prosecution as part of its case. If there were any doubt about that in this particular case, your Honor, the indictment in this case in each of the four counts on which we have been tried makes the same allegation with respect to materiality. I won't read the whole indictment, of course, but I am referring to the clause after the clause about the filing and causing to be filed, because the clause I am referring to reads as follows, and it is the same in all four counts "knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit," and then it goes on.

So, we say first that under the law and under the rules with respect to indictments it is incumbent upon the Government to make proof of every allegation in the indictment, and, therefore, it was incumbent upon the Government to make proof of materiality in connection with each of the four counts because materiality is alleged. That is point number one.

Point number two, in the two cases in which we have the record, and I have them here right now, the Gold case and the Jencks case, materiality was not alleged in the indictment. Despite that in both cases the Government made proof by evidence or by stipulation as the case may be in both cases, I think it was by evidence, of materiality, and I am prepared to come back to that and give you the exact point in those records, that is, in both Gold and Jencks, in which the defendants were indicted in 1953, materiality was not alleged in the indictments but nonetheless the Government made proof of materiality on the trial.

As we reconstruct the picture when this defendant was indicted in October, 1954, the Government on a basis par-
[fol. 1096] ticularly of the Rolland case in the Fifth Circuit—I am not necessarily saying it was decided between Gold and Jencks indictments, on the one hand, and the Travis indictment, on the other, it doesn't matter, it is the leading case on this subject—on the basis of the Rolland case the Government had decided by the time Travis was indicted that the law required an allegation of materiality in the indictment, but whether I am wrong or not in any speculation about the Rolland case the fact is that in this indictment the Government did allege materiality.

Now, with respect to the Rolland case and subsequent cases, if the Court please, there is now a sharp split in the Courts of Appeal and in the District Courts as to whether or not materiality needs to be alleged in an indictment under 1001, but, be that as it may, the law is settled, as we see it, that whether or not materiality is alleged in the indictment it needs to be proved, so that, for example, take the prosecution's own position in Gold and Jencks, who were indicted as I say in 1953, who were tried in 1954, Jencks being tried in January and Gold in March, on both of those trials even though the indictments had not alleged materiality the Government proved materiality.

Our next point, your Honor, is that the record of the first trial in this very cause demonstrates that it was the Government's understanding that materiality had to be proved, and in that connection in fact the Government asked us for a stipulation which we agreed to before trial on materiality, and that stipulation was made part of the evidence by Mr. Kelley, himself, at page 18 of the typewritten transcript of the testimony in the first trial in two paragraphs there, and I think for continuity, if the Court please, it would be better if these are read into the record, they are not very long: "It is further stipulated that during the life or the effect of the two affidavits, Exhibits 1 and 4, that the International Union of Mine, Mill & Smelter Workers used the facilities of the National Labor Relations Board. It is further stipulated that the agreements with reference to the Exhibits and the previous stipulation apply only to the facts so stipulated and not to the legal effect of said admitted facts."

So, it is the first sentence of those two that I read which embodies the stipulation with respect to materiality or specifically the use of the facilities of the NLRB.

In that connection, if the Court please, I should at this [fol. 1097] point state for the record, and I am sure there will be no dispute as to this, that before this trial Mr. Kelley discussed with us a similar stipulation. At the same time he discussed a stipulation with respect to the six documentary exhibits at the beginning of the case with respect to which we stipulated on the first trial and again stipulated on this trial, and at the time Mr. Kelley discussed it with us, defense counsel, particularly with me in connection with this trial before the trial began we told him or, again, specifically I told him that we would make the same stipulation with respect to materiality we made on the first trial.

So, that is a further indication that from the prosecution's point of view throughout the history of this case, the first trial and the second trial, the Government has regarded proof of materiality as an essential part of its proof in this kind of a case. Finally, the precise issue as to proof on this matter was decided by the Court of Appeals for the District of Columbia Circuit, and as far as we see it this is the leading case on the matter. This is Freidus vs. United States, 223 Federal Section 598 particularly at pages 601-602. That was decided in February of 1955, your Honor. Again, for continuity I would like to read this quotation which is the entire quotation on this matter from the opinion into the record, and your Honor will have it in convenient form.

Let me say first that in this opinion which is a unanimous opinion of that Court of Appeals the Court decided both that materiality had to be alleged following the Rolland case which the Court relied on and also said in any event that materiality had to be proved. I will now read this quotation from that opinion: "One portion of Section 1001 refers to willfully and knowingly falsifying, concealing or covering up 'a *material* fact.' On the other hand, the part here involved, without expressly mentioning materiality, prohibits 'any false, fictitious or fraudulent statements or representations.' We think, however, that this highly penal statute must be construed as requiring a material falsifica-

tion. The legislative purpose strongly implies that only material false statements were contemplated, i.e., statements that could affect or influence the exercise of a governmental function. That purpose, as expressed by the Supreme Court in United States vs. Gilliland, was 'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the [fol. 1098] deceptive practices described.' No perversion of a governmental function could possibly result from a false statement that was incapable of affecting or influencing such function. And the greater weight of authority in the federal courts supports the view that materiality is an essential element of the offense described by Section 1001. The Government does not deny that proof of materiality is essential under Section 1001. Instead, it argues only that 'the false representations were material.'"

So, that speaks for itself as far as the rule of evidence on materiality is concerned, and also as indicated by my emphasis on that next to the last sentence in that very case the Government did not deny that proof of materiality is essential under Section 1001 and argued that in the particular case on the evidence the false representations were material and just to complete the record on this case of what happened. The Court went on after saying what I have quoted to examine the evidence and disagreed with the Government on its conclusion from the evidence, and the Court concluded in the particular case the false representations were not material. But that part on the evidence, of course, is irrelevant here, because there can't be any dispute that there is not a word in this record on the basis of which the Government can argue as to materiality. That is our argument, your Honor.

Mr. Kelley: Your Honor, regardless of whether materiality has to be proved or not as an essential element, first, let me say the statute, the part that we indicted under doesn't contain that word. In fact, it is in there and can very easily be construed as being surplusage, but we have proved materiality by showing that had the affidavit not been filed the Mine-Mill Union could not have used the facilities of the National Labor Relations Board. That shows that it was a material false representation.

Now, if we had attempted to put a witness on the stand to say that this statement, this false statement was material, counsel would have objected either that we were invading the province of the jury, that that was a conclusion they would have to draw from all the evidence, or he would have objected that it is something that the Court has to determine as a matter of law, and we feel that the fact that—but for the fact that the alleged false representations in the affidavit had not been executed by the defendant they could not have used the facilities of the National [fol. 1099] Labor Relations Board. That it seems to me shows that it was a material false representation.

This case came up in Fisher vs. United States, 231 Federal Second, page 99 at page 102, and this is what the Court of Appeals of the Ninth Circuit I believe it is had to say on the point: "The Government contends that 'materiality' is not an essential element of the crime of filing a false written document but that the term applies only to the first section of 18 U.S.C. Section 1001 dealing with making a concealment of a material fact." And they cite U. S. vs. Lange, District Court case, Southern District of New York, and a District Court case in Pennsylvania.

"The language of Section 1001 seems to justify such a construction. However, even if an opposite construction is taken, appellant has not alleged that this defect in the indictment was prejudicial nor has he made any showing to this effect. Appellant knew the materiality of his statement. The statements ultimately proved were certainly material. If this is error, it is harmless error under Federal Rules of Criminal Procedure 52 (a) 18 U.S.C."

And we think the same thing prevails. This also was a non-Communist affidavit case out in the District of Washington, Western District.

The Court: What do you mean by proof of materiality, what do you mean in the way of proof? I think the record supports what Mr. Kelley said about what the proof is here with respect to this matter. What do you mean by proof or you said something about the Government proving it in a couple of cases that you mentioned, what do you mean by that?

Mr. Witt: All right, sir, may I take Mr. Kelley's argument in order? I have notes, and I will include that which I was intending to do.

The Court: All right.

Mr. Witt: I tried to follow Mr. Kelley very closely on this. Taking his first point, as I followed it, he said the allegation of materiality in each of the counts at worst was surplusage. Our answer to that, your Honor, is that [fol. 1100] that may well be under the cases although, as I said, as I see the cases, there is a split as to whether it has to be alleged, but the point on this is by alleging materiality in the indictment the Government deprived us of an opportunity to argue that its absence was fatally defective under the Rolland case. We didn't make that argument, your Honor.

In the Gold case, as I recall, although I may be mistaken, I think counsel made the argument addressed to the indictment on a motion to dismiss that it was fatally defective in failing to allege materiality, but, be that as it may, Mr. Kelley at this stage of the game doesn't have the argument that that can be regarded as surplusage, because we were deprived of a basic position on a motion to dismiss both before the first trial and before this one. Secondly, Mr. Kelley said that in any event as proof here, however you put it, because unless Travis' affidavits as well as the other affidavits in the filings under 9 (f) and (g) were accomplished, Mine-Mill could not have used the facilities of the Board, but that is highly speculative. This is a criminal case, and, if we are right, this record as part of the Government's case has to show that during the year from December of '51 to December, '52, and the year from December, '52, to December, '53, Mine-Mill did use the facilities of the Board.

Your Honor, in case it has slipped your mind or you are not thinking of it at the moment you will recall that Section 9 (h) makes these affidavits effective for only one year so that, if we are right, the Government had to prove as part of its case that the facilities of the Board were used with respect to the first affidavit during the period from December of '51 to December of '52, and with respect to the second affidavit during the period from December, '52, to Decem-

ber, '53, and there isn't a word in the record that Mine-Mill used the facilities of the Board during those two years.

Now, again, I come back to the stipulation in the first case which took care of that problem which we have given to the prosecution and which became a part of the evidence in the case and to the fact that Mr. Kelley asked us for a similar stipulation on this occasion to take care of the problem, but for some reason or other it didn't become part of the evidence.

Now, it is true that, for example, in my cross examination [fol. 1101] of the witness Mason I asked him about an NLRB election in March of 1954, and he was permitted to answer over objection I think, but all that shows is that the NLRB was on the ballot in March of '54, but it is not proof that Mine-Mill was on any ballot or filed charges or participated in representation cases during the two years in question. All that evidence shows is that for the year encompassed by March, 1954, probably in the year beginning December in '53, Mine-Mill was in compliance and used the facilities of the Board.

In the third place, Mr. Kelley says, if they put on a witness, we would have objected. Well, that just doesn't add up at all, your Honor. If we had refused to give Mr. Kelley the stipulation I referred to and that we gave him in the first trial, then, of course, Mr. Kelley's only alternative would have been to call a witness from the NLRB the way the Government did in Jencks, because in Jencks they either didn't ask us for a stipulation, or, if they did, we turned it down, and I am coming to that in a moment, your Honor, in answer to your question. I will give you the references in the Jencks record where the Government proved it by an official employee of the NLRB. I will also refer to so much of the Gold record as we have in answer to your Honor.

Finally, as far as the Fisher case is concerned the very quotation that Mr. Kelley read demonstrates that the Court there was dealing with pleading in the indictment and not with proof. If there is any doubt about it, I examined that opinion very carefully especially the section Mr. Kelley read, and I have examined the two District Court cases which the Court referred to. If there is any ambiguity in

that Fisher opinion and in both cases I have them summarized in my notes, Mr. Kelley has them in the official opinion, both cases deal with this question of pleading and do not deal with the question of proof, and both cases are among the cases which take a position contrary to the Rolland case and other cases on the matter of pleading and have nothing to do with proof.

Now, as far as the references in the Jencks case go, your Honor, give me half a minute. I will find the references in the testimony of this NLRB person and in an exhibit. The Jencks case the Government called Mrs. Elsie Perryman at page five of the printed record in the Supreme Court, and she testified that she was the Office Manager for the NLRB in the El Paso office. Just again for continuity in [fol. 1102] the case in case anybody has forgotten, your Honor, Mr. Kelley will agree, that when the filings by a local union officer as Jencks was, he being an officer of Local 890, and it is in connection with his affidavit as President of Local 890 that he was indicted, the procedures of the NLRB require that the affidavits and the other documents required be filed with the Board's local office, but that, if the affidavit is by a national officer, it is filed with the National Office of the Board in Washington. So, Mrs. Perryman was produced in order to give testimony on this question among others as the Office Manager for the NLRB in El Paso.

Then, the Government used her to put in all the necessary documents including the affidavit and the other things we have stipulated to in this case, and among others she identified and gave testimony about Government's Exhibit 13 which was identified on page 12, all these page references are in the Supreme Court record, and at page 23 she was questioned about it, this, of course, is on the Government's case by the prosecutor, and I will read this into the record: "Question: As a result of that compliance did Mine-Mill take advantage of the Taft-Hartley Act during the year 1950?" There was an objection; it was overruled. "Answer: They used the services of the Board, yes, sir. Question: Now, what is G-13?" He hands the document to the witness. "Answer: It is NLRB Form 601 Charge Against Employer filed with our office. Question: What does that mean to

us Laymen, Mrs. Perryman? Answer: It is a charge filed by Local 890 against employer Empire Zinc Company alleging violations of Section (a), Subsections 1 and 5 of the National Labor Relations Board. Question: Is that in compliance with the Taft-Hartley Act?" And then there is an objection, and then the witness answers on page 24: "Yes, sir." Then the exhibit itself will be found on 406, and it is as the witness testified an NLRB form with that number that she gave entitled "Charge Against Employer" dated October 28, 1950, signed by Clinton E. Jencks, President of Local 890, and I gave you the date, your Honor, to indicate or to emphasize the point I made a few minutes ago that the use of the Board has to be shown.

The Court: Doesn't the record here show substantially the same thing?

Mr. Witt: May I just finish the sentence?

[fol. 1103] The Court: All right.

Mr. Witt: That the record has to show as part of the proof that the Board was used during the life of the affidavit in connection with which the defendant was indicted. So, I gave you the date of this charge as being October 28, 1950. The record in the Jencks case will show that the affidavit was dated April 28, 1950. Now, again, I say in anticipation of what you are about to ask that the record in this case does not show by stipulation or otherwise any use of the NLRB by Mine-Mill during the period, the 2-year period from December, '51, to December, '53.

The Court: Well, I had the impression it did in the testimony of someone, was it Mason or who?

Mr. Kelley: The cross examination of witnesses showed that, but, your Honor, I don't think that is important.

Mr. Witt: I do not think we should pass that. I think that is important. I don't think Mr. Kelley should make these statements without backing them up.

Mr. Kelley: I wish you would follow that. I would like to start that right now. That is a good idea.

The Court: I just asked the question.

Mr. Witt: I do not think Mr. Kelley gave you an exact answer.

Mr. Kelley: Your Honor, here are two of the things that are material at this point: "It is further stipulated that the

International Union of Mine, Mill & Smelter Workers filed with the National Labor Relations Board and the Department of Labor all other documents required by law for compliance with Sections 9 (f, g and h) of the Labor-Management Relations Act of 1947."

"It is further stipulated that the making and filing of an affidavit of the Non-Communist officer is a matter within the jurisdiction of the National Labor Relations Board and that the National Labor Relations Board is an agency of the United States." Those appear on page 31.

[fol. 1104] Mr. Witt: No dispute.

Mr. Kelley: Now, the materiality of the false statement is not affected one way or the other by whether or not they actually used what they have obtained. They obtained the right to use the facilities by reason of this affidavit and the other things, and, so, it was as far as the law was concerned, everything had been done to entitle them to that use. So, that, it seems to me, is as far as you need to go on that.

Now, also, the letter which was read into evidence from the Board states that they were in full compliance, and I will get it so I will be absolutely sure of it.

Mr. Witt: We don't contest that. The two letters, Exhibit 3 and 6—

The Court: All right, get the letter.

Mr. Kelley: Exhibit No. 3, which is a carbon copy of a letter dated January 8, 1952, addressed to Mr. John Clark, President, International Union of Mine, Mill & Smelter Workers, Suite 412, Tabor Building, 16th and Curtis, Denver 2, Colorado: "Dear Mr. Clark: This will acknowledge receipt of your letter of December 21, 1951, enclosing compliance material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act, 1957.

"The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until June 30, 1952, and under Section 9 (h) until December 7, 1952, provided there are no intervening changes in your officers. Our Regional and Sub-Regional Officers have been notified of your renewal of compliance. This, of course, does not cover your local organizations. Each local

must separately meet the above filing requirements of the Act in order to enjoy its benefits. We will give you 30 days advance notice," and so forth.

Then, there is substantially the same letter in reference to the affidavit for the following year. So, it shows that on its face that it was acted upon by the National Labor Relations Board, and, had it not been filed, they would not have gotten this application. Therefore, it is material, it [fol. 1105] shows also nothing further is required. They had gotten all that they needed as far as the Government was concerned when they filed the affidavits.

Mr. Witt: If the Court please—

Mr. Kelley: There is one other thing I would like to say because of Mr. Witt's argument. He said by alleging materiality that we had deprived them of an argument, and then he goes on to point out that they agreed the last trial that this matter was material and they stipulated as to it, and they were ready to stipulate at this trial and say that we have now overlooked it, but they want, they are ready to concede it up to the point of our resting, but then they claim they have been prejudiced by it. It is sort of a specious argument it seems to me.

Mr. Witt: Well, if the Court please, I do not know what Mr. Kelley is trying to say so I won't try to answer it, but Mr. Kelley is wrong, absolutely wrong.

Mr. Kelley: In your opinion.

Mr. Witt: Well, of course, in my opinion.

The Court: He is arguing this point. Proceed.

Mr. Witt: In Mr. Deikman's opinion too. When he says all we need do is show compliance, that was done in the Jencks and Gold cases, and they went on and showed materiality, and it was shown on the first trial here. He doesn't dispute the fact that he asked for a stipulation in the second trial, and I again refer the Court to the stipulation on page 18 of the typewritten transcript of the first trial, that after Mr. Kelley put in his six exhibits and after they showed there was compliance the prosecution, Mr. Kelley individually personally felt it was necessary to put in this other stipulation to the effect that the International Union of Mine, Mill & Smelter Workers "used the facilities of the National Labor Relations Board." We had been good

enough to give the prosecution that stipulation in the first case, we agreed to it in this case, because we didn't see any point in burdening the Government with bringing people from Washington, contrary to the lack of cooperation the Government has shown us in getting our proof in. We don't [fol. 1106] fuss about things we don't think it is necessary to fuss about. But in any event, Mr. Kelley's own handling of the first trial demonstrates that he thought it necessary as part of the Government's proof to show that the Board was used beyond merely compliance.

Now, your Honor, I didn't finish answering your question about the Gold record, and I just found my notes. Now, we don't have the entire Gold record here. I would have had it if I thought this question would have come up, but, if there is any problem about it, we can get it, perhaps the Government has it here, but what we do have is the Government's opening statement as to what the Government would prove in that case, and we are sure that the Government proved on this particular point, they said in their opening statement they would prove. This will be found beginning on page 103 of the appendix to appellant's brief on appeal, and this is the record that was used both in the Court of Appeals and in the Supreme Court, and I will take the liberty, your Honor, I am sure you would want to have this, of reading from the Government's opening statement. After discussing the Government's proof or what the Government would make on proof of compliance along the same lines here the prosecutor went on to say, it is Mr. Lowther at the bottom of page 103: "We intend to show further that on the basis of the filing of this affidavit not only were the Board facilities available but were used in fact by locals affiliated with the International Fur and Leather Workers Union within the year ensuing from the date of the affidavit." Well, that is sufficient to show—

Mr. Kelley: All that proves, your Honor, is it was done a different way a different time.

Mr. Witt: The different way is the critical thing we are talking about.

The Court: Here is what the record here shows without any question, that the facilities were available, that letter you just read from—

Mr. Witt: No question about that, but, again, I want to come back—

The Court: You are contending that in addition to showing that the facilities were made available by the filing of [fol. 1107] the affidavit that they had to show there was an actual utilization of that service.

Mr. Witt: Right, during the period in question.

The Court: I do not believe that is the law, because, if that was the law in an ordinary false claim, I mean false claim for money or something of that sort to induce the Government to act, they discover the fraud before the money is paid, I think there are numerous cases that hold in that set of circumstances under 1001 that there is an offense established.

If you mean that, for instance, in a case like this that the fact that the union after filing the affidavits never availed themselves of the benefits of filing that they committed no offense of filing a false affidavit—that is what it amounts to—I do not agree with that at all.

Mr. Witt: No, sir, we don't say that, your Honor. We say the case that you put is different. We say the cases hold particularly the Rolland case which holds it as to both pleading and proof and particularly the Freidus case as well as the Government's own course of conduct in the Gold, Jencks, and on the two trials in this case that that material shows conclusively that both the Government and the Courts are in agreement that use of the facilities of the Board is an essential element of the Government's proof.

The Court: I do not believe that is the law. So, on this phase of the thing the motion will be denied. Now, we can take a little recess on this argument and come back on this sufficiency of evidence business.

(A recess was taken.)

After Recess

The Court: All right, Mr. Witt.

Mr. Witt: First, this one matter in connection with the materiality point, your Honor. I want to say again that Mr. Kelley is mistaken when he says that there is evidence in the record that Mine-Mill used the Board from December,

[fol. 1108] '51, to December, '53. If Mr. Kelley has any particular evidence in mind, he should refer us to it.

Mr. Kelley: In view of the Court's ruling that he didn't take that into consideration in regard to it I have made no check of the record. I have nothing further to say on it. The record has been misquoted rather freely, and we haven't indulged in the practice of correcting any statement. So, I pass.

* * * * * * *

[fol. 1113] The Court: * * * I am satisfied there is sufficient evidence to take the case to the jury, and, therefore, the motion for acquittal will be denied.

* * * * * * *

[fol. 1118] In-Chambers

COLLOQUY RE INSTRUCTIONS AND OBJECTIONS

The Court: Counsel and the Court had an informal discussion this morning relative to the instructions to be given in the case, and in connection with that discussion counsel exchanged some instructions they wished to offer and also gave the Court copies of the instructions they wished to tender in part. This case was tried once previously and taken to the Court of Appeals and reversed, and among other things the Court of Appeals suggested that the instruction relating to membership in the Communist Party should be made more specific, commented upon the matter at some length in the opinion, and, so, I first will pass to that matter.

The Government tendered proposed form of instruction consisting of four pages entitled "Instruction on Membership" I have concluded to give this instruction in substance as tendered by the Government. I expect to do a little editing on it to make it to conform to my manner of expression in some particulars, and I also think there are probably a few places where there may be some matter that is repetitious or statements contained in the general instruction, but in substance I propose to give the instruction on membership tendered by the Government.

Now, the defense may make such objections as they think proper for the record. If you wish me to pass on your in-

[fol. 1119] structions so you can do it all at once, I can do that. Which way would you prefer?

Mr. Witt: Why don't you do it all at once?

The Court: Well then, the defense has tendered two instructions relating to this matter of membership. With the permission of counsel for the defendant I will now mark the first of those instructions as Defendant's requested Instruc-struction No. A. That instruction begins, "You are instructed that the defendant's admitted membership in the Communist Party before August, 1949, did not," and so forth. I struck out the "S", Mr. Witt, on the word "Instructions".

The Court refused this instruction on the basis that a portion of it is already covered by the instruction I propose to give on membership, and the remainder of the instruction which discusses specifically the testimony of the witness Eckert I think is argumentative in form and would be confusing to the jury without the statement of the contentions of the Government with respect to his testimony. The Court as a matter of fact as a general practice refrains from giving instructions directed to specific testimony unless, of course, the circumstances absolutely require first to instruct on abstract principles of law. I think this instruction, as I say, is argumentative in form and particularly as mentioned on pages 2 and 3, and I believe the portions that are proper as I have indicated are already covered by the instruction that I will give on the question of membership.

Now, the defendant has also tendered an instruction which I will mark with your permission as Instruction No. B as tendered Instruction No. B which reads at its beginning, "Membership in the Communist Party is a formal relation between an individual and the Communist Party which is defined by the rules and regulations of the Communist Party." That is the beginning sentence of the instruction. I also will not give this instruction in the form tendered. I think the instruction is general, and the specific instruction on membership which I have indicated I would give covers the proper features of the instruction, and a good many of the statements contained in the instruction are I think duplicated in effect by statements in the instruction to be given. So, that instruction will also be refused.

Now, I think those are the only two instructions that the [fol. 1120] defendant has tendered relative to this membership matter.

Mr. Witt: Yes, your Honor, thus far except we will have one more related to it but also related to the problem of affiliation, so, I do not think we need bother now.

The Court: You can offer it later. You may at this time state any objections you have to the giving of the Government's instruction which I have identified and also to the refusal of your Instructions A and B.

Mr. Witt: What did you call the Government's instruction?

The Court: I didn't call it any number. I don't designate numbers for instructions when I give them. I referred to it their tendered instruction on membership which you have a copy of I think.

Mr. Witt: Yes. If the Court please, at this time may we reserve our objection to the instruction the Court will give until we see it? We take it the procedure will be after your Honor disposes of these tendered instructions that we will see your Honor's proposed instructions and will be able to make objections to those as well. So, we reserve that on this issue of membership.

The defendant objects to the refusal of the Court to give Defendant's requested Instructions A and B and further objects to the instruction on membership tendered by the Government in so far as it embodies the 11 indicia from Section 5 of the Communist Control Act of 1951. We say that section and the 11 of the 14 indicia listed in Section 5, the 11 which the Government has included in its requested instruction violate the First Amendment to the Constitution, the Fifth Amendment to the Constitution, and the Sixth Amendment together with Rule 7 of the Criminal Rules.

Secondly, we object to the Government's request, because even if aside from the 11 indicia the request contained appropriate principles of law the 11 indicia undermine those and render what would otherwise be correct and appropriate meaningless, improper, and unconstitutional. And finally, we object to the Government's requested instruction, be- [fol. 1121] cause it doesn't embody the thought expressed in the last paragraph of Defendant's requested Instruction

B concerning the Defendant's belief as to whether he was a member at the time he filed the affidavits.

The Court: Is that all you had to say?

Mr. Witt: Yes. Would you mind so we will understand the procedure you are pursuing, as I said, we gather that after your Honor furnishes us copies of your instructions we will have an opportunity to object more specifically.

The Court: No, I ordinarily do not furnish copies of the instructions. You will have an opportunity, of course, before the case is submitted to the jury to object to instructions after you have heard them given in the courtroom.

Mr. Witt: All right, sir.

The Court: But to do away with that delay, which is kind of awkward, I mean we get the instructions given and then let the jury remain there in the box and have to come in chambers or something, my general practice is, and I can do that I think in the morning, is to read to you this particular instruction the way I propose to give it. I will have it ready by then, and, if you wish to make any objections, you can then, and then the objections after you hear them in the courtroom can be just limited to additional objections. That is the way we generally do it.

Mr. Witt: When did you say you would read them to us?

The Court: I think I can probably have it, as I say, I expect to edit it a little bit. I noticed what I thought—it may not be true, some repetitious statements about burden of proof and that sort of thing, and then also I think I will try to put a paragraph in to connect it up with the context of the others, but outside of that it will be in substantially the form there, maybe a word change or something like that.

Mr. Witt: You said something about reading it to us.

The Court: I said usually when I get it prepared, which, of course, I could have it prepared before morning before [fol. 1122] the arguments start, I can read it to you and you make any additional objections you want to. As a final safeguard you have a right to object after the instruction is given and before the jury retires you see.

Mr. Witt: I understand that.

The Court: We maybe can let it go this way. We just generally do that in the interest of saving time, so to speak. But anyway, you will have an opportunity to make formal

objections more complete than you have made now at the present time. In addition to this instruction on membership we have just been discussing the Government has tendered an instruction which is entitled "Instruction on Affiliation". The Court of Appeals in the opinion in this case in effect, not in effect but expressly approved the instruction given by Judge Breitenstein in the first trial on this subject of affiliation.

The Government has tendered an instruction on affiliation which is in substantial conformance, as I understand it, with the instruction Judge Breitenstein gave but adds I think a paragraph or something relative to the burden of proof and so forth. I propose to give this instruction on affiliation as tendered in substance. I do not think in that one there will be any word changes made at all. I do not think that is quite accurate. I think possibly the way it reads now the first paragraph has been stricken in the tendered instruction, and it starts out with the word "affiliated" and so forth. I think possibly it would be proper to add there, "Affiliation as used in Counts 2 and 5 is not the same as membership". I am adopting the language of the defendant's instruction in that respect. Possibly there will be some changes along that line just in context, but it will be given in substance.

Now, the defendant has requested an instruction on this subject of affiliation which for purposes of reference may be designated as Defendant's requested Instruction No. C. This instruction reads beginning with the first line, "Affiliation as used in Counts 2 and 5 is not the same as membership." The Court will refuse Defendant's Instruction C, first, on the ground that the proper material in the instruction is already incorporated in the instruction which the Government has tendered and which the Court will give on this question of affiliation.

For example, the second sentence of the tendered instruc- [fol. 1123] tion is covered almost expressly in the same language in the Government instruction in the next paragraph in its entirety. I think without comparing it word for word it is included in the Government's instruction. Counsel advises that the last paragraph on the first page of the tendered instruction starting, "Whether intermittent or re-

peated the act or acts tending to prove affiliation" and so forth, as well as the first paragraph on page two of the tendered instruction taken from the language of Justice Douglass in the case, I don't recall the title—

Mr. Witt: Bridges vs. Wixon.

The Court: My own conclusion is that that principle is not involved in the present case, and I think it would be a mistake to instruct the jury on that principle. I am also advised by counsel that the last paragraph on page two is taken from an opinion in the case of—what case was that, Mr. Witt?

Mr. Witt: The opinion of Chief Justice Vinson in ACA vs. Douds.

The Court: I do not believe that that principle is applicable here or that the giving of the instruction in the form tendered would be proper. I wish to expressly ask the Government with respect to this instruction, what objection they have to the incorporation of paragraph 4 which starts, "Mere cooperation with an organization does not establish affiliation." It has been given in connection with membership instructions, and I do not know, I thought I might include that sentence but I am not sure.

Mr. Kelley: I think our primary objection to it, your Honor, is that it is only partially true. You would have to add to it something like this: That, "However, these things that are mentioned taken together with other acts on the part of the defendant could be used to establish affiliation." It is only a halfway statement; it is not a complete statement, and it might mislead the jury.

The Court: I was just a little bit fearful of it. I think it is covered properly in some principle in the second paragraph of the instruction you have tendered. So, I guess I will not include any of that part in the instruction that I [fol. 1124] will give. Do you wish to make objections to either the giving of the Government's instruction in substance or the refusal of your instruction?

Mr. Witt: Yes, sir.

The Court: All right.

Mr. Witt: If the Court please, we object to the Court's refusal to give Defendant's requested Instruction No. C respecting affiliation on three grounds: One, because the

Government's request does not include that paragraph just referred to beginning with—which is the fourth paragraph on the first page of Defendant's requested instruction beginning with the words "Mere cooperation"; number two, on the ground that the paragraph beginning on the bottom of the first page and including on the second page of Defendant's requested instruction beginning with the words, "Whether intermittent or repeated," should be given on the basis of Mr. Justice Douglass's opinion in Bridges vs. Wixon; and on the third ground that the Government's requested instruction does not embody the last paragraph of Defendant's request relating to defendant's belief at the time of signing the affidavits which we believe is called for by the opinion of the Chief Justice, the late Chief Justice in ACA vs. Douds.

Then we also object to the last two paragraphs in the Government's request which your Honor has indicated you will give together with the rest of the Government's request on this issue. We object to the penultimate paragraph in this request referring to circumstantial evidence because of our position with respect to the perjury rule. In the event this cuts across other instructions may we say generally now that—

The Court: I was going to reach that instruction next, but you can proceed.

Mr. Witt: Just to finish this point so we will cover it in case we miss it elsewhere in your Honor's instructions, as indicated in the defendant's request your Honor is about to come to on the conventional principles and our position that the perjury rules are applicable that circumstantial evidence merely stated in the form it is in this penultimate paragraph of the Government's request on affiliation is improper.

[fol. 1125] Then on the final paragraph in the Government's instruction we object to it, because it destroys the effect of the rest of the instruction, and, unless I am mistaken, that thought expressed in that paragraph, the paragraph in haec verba or the substance of it was contained in Judge Breitenstein's charge which Judge Lewis's opinion approves.

The Court: I didn't get the significance of that last statement.

Mr. Witt: This last paragraph of the Government's request on affiliation, your Honor, beginning with the words, "In determining the issue".

The Court: Yes.

Mr. Witt: We say that the way that is expressed that destroys the effect of the principles stated otherwise in the Government's instruction, and we say further on that paragraph that it wasn't contained in Judge Breitenstein's instruction on affiliation which the Court of Appeals approved.

Mr. Kelley: The Government concedes that, your Honor, that this last paragraph on page two of our tendered instruction was not given at the last trial. However, in the Bryson case it was given.

The Court: In what case?

Mr. Kelley: Bryson. That was in the Ninth Circuit, and certiorari was denied in that case, and that was the reason we put it in there. We don't feel strongly about it one way or the other.

The Court: When I read it over I concluded to leave it in, but on the face of the objection made here I think I am going to exclude it on this basis that gives me a little concern: These indicia of membership which are included in the instruction on membership which in Section 5 of the Communist Control Act of 1954 are specifically referred to in the Court of Appeals opinion as relating to the matter of membership. Of course, the jury will be instructed that affiliation and membership are two separate things, and I am a little bit fearful of some notion by this statement here [fol. 1126] which gives the jury the right to consider in considering the question of affiliation the matters of evidence suggested to be considered in arriving at your finding on the issue of membership. It might confuse them about the question, so, out of an abundance of precaution I think I am going to strike that last paragraph, and I will not give that last paragraph on this instruction.

Mr. Witt: In view of that may we confer for a moment?

The Court: All right.

Mr. Witt: Your Honor, in view of your Honor's ruling striking out the last paragraph of the Government's proposed instruction on affiliation we wish to make this further

point which cuts across both the membership instruction and the affiliation instruction: Even if the instruction on affiliation were otherwise proper or, in other words, even if your Honor gave our requested instruction on affiliation, our Instruction C, if your Honor is going to give the substance of the Government's instruction on membership, at least, if your Honor is going to give an instruction on membership which embodies the 11 indicia, any of the indicia from Section 5, we say that embodying any part of Section 5 and the membership instruction also destroys what would otherwise be a good instruction on affiliation for the simple reason that even at best it is almost impossible for a jury to consider the evidence in a case like this and particularly the evidence in this particular case and make a distinction between what is evidence of membership and what is evidence of affiliation even if you had the most beautiful instructions on those two words you could imagine. The injection of Section 5 or any part of it into the membership instruction makes the distinction between membership and affiliation impossible even to the most learned and subtle of jurors.

The Court: The Court of Appeals didn't seem to share that apprehension, because in the opinion they approved the instruction that was given with respect to the definition of the word "affiliated" and relating to affiliation and then proceed to specifically, as I understand the opinion, require that these indicia of membership that we have been talking about be included in the instruction relative to membership.

Mr. Witt: We understand. We think your Honor is bound by that opinion, but we are objecting.

[fol. 1127] The Court: I understand that, but I wanted to get this in here. Now, as I understand, this instruction in its present form is like the instruction that was given in the other case.

Mr. Kelley: Yes. What is left now is exactly the same.

The Court: One other thing that won't appear because I am giving the instruction, there is nothing in the record to show what part was deleted. So that the record may show the sentence that the Court has omitted it reads as follows:

"In determining the issues as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration any statement made or acts done by the accused, and all other facts and circumstances in evidence which may aid determination of the issues, including any matters of evidence suggested to be considered in arriving at your finding on the issue as to membership."

Now then, the defense has tendered another instruction which for convenience or information or for identification I have identified as Defendant's requested Instruction No. D. This is in the first paragraph of the Defendant's requested conventional instructions regarding the presumption of innocence—the burden of proof and reasonable doubt and the inference that is to be drawn from the fact of an indictment.

Mr. Witt: Et cetera was left out right after the word "indictment"—etc.

The Court: Those would be the basic general instructions and, of course, will be given, but the tendered instruction expressly requests that the usual instruction about circumstantial evidence be omitted and that the jury be instructed that the so-called perjury rules of evidence are applicable to this case, and then the instruction proceeds to set out what would be applicable to be applied in a perjury case. In other words, the defense seeks, as I understand their position, to have made applicable to this case the same rules with respect to the sufficiency of evidence that are required in a perjury prosecution. This matter has been discussed in several cases, and as I understand, the accepted rule is that these, in these cases under Section 1001, Title 18, they do not come in the category [fol. 1128] of perjury cases and that the degree of proof required in a perjury case is not essential to establishing guilt in a case under 1001 and for that reason this tendered instruction will be refused.

Mr. Witt: The defendant objects to the refusal of the Court to give the jury instructions as requested by the defendant in his requested Instruction No. D, that the perjury rules of evidence are applicable to this case.

The Court: Now, that completes the instructions which have been duly tendered and offered, as I indicated in our general discussions here, some of which at least were off the record, that in light of the fact that the Court of Appeals without any express declaration to that effect but in effect, nevertheless, have approved the other instructions given at the time of the first trial with the exception of the instruction relating to the subject of membership the Court proposed to use the instructions given in the first trial of the case by Judge Breitenstein. Now, I have prepared for myself here a copy from the record of the instructions given. I assume counsel have available to them or here the record or copies of the instructions that were given by Judge Breitenstein, and it has occurred to me that probably the most expeditious way of proceeding would be to find out now by looking at these instructions what if any objections there were to the instructions as given, and then, if there are any additional areas where instructions would be considered, we can consider them. Do you have a copy of the old instructions?

Mr. Kelley: They are in Volume XIII.

The Court: I hesitate to read them through. I thought if you could get them and counsel could read them as they were given and then when we come to a place where you think there should be some comment, why that you can do it that way.

(A recess was taken.)

After Recess

The Court: Have you looked over the instructions that were given before?

Mr. Witt: Yes, sir.

[fol. 1129] The Court: I am referring now to Defendant's requested instructions that were handed to me just before the last recess which have not been mentioned for the record before now. I think the best way to do is to number these as we go where they are refused. I will give in substance the instruction which reads, "You may have been inconvenienced." I am going to give that in substance.

Mr. Kelley: That will be "E"?

The Court: The refused instructions are all that we need to number. This one will be given. I will mark it given in substance. I am going to elaborate on it a little more.

Mr. Witt: Let the record show that we leave this to your Honor's discretion.

The Court: The next one I come to is one that starts out in relation to the Taft-Hartley Act, "As I instruct you during the course of the trial compliance with Taft-Hartley," and so forth. Have you found that?

Mr. Kelley: Page 1458 that is covered.

The Court: I was going to say in the instructions that were given and which I propose to give they covered this subject.

Mr. Witt: That is the one we had stipulated on in the first trial, isn't it?

The Court: No. I was going to raise the question I do not know whether I will deny this or give it. I have it on mine, I do not know the page number in the record.

Mr. Kelley: 1458. It starts out, "The Labor Management Relations Act."

The Court: It starts out, "The Labor Management Relations Act," if you can find that place. The question I have is whether your tendered—I propose to give that instruction that was given to me. It seems to me yours except for maybe one sentence or something like that is just substantially like the one that I intended to give.

[fol. 1130] Mr. Witt: Give me a half a moment.

The Court: Yes.

Mr. Witt: Yes, I do not think we should have a problem on that. We think you should add not one sentence of ours but two. Ours has three sentences. Judge Breitenstein's paragraph takes care of our first sentence, but we think that you should add at the logical place or places in Judge Breitenstein's paragraph the two remaining sentences in our request.

Mr. Kelley: May I say something on that, your Honor?

The Court: Yes.

Mr. Kelley: What this in effect is doing is stating in a negative way the elements of the offense. In prior instruc-

tion or instructions the Court sets forth what the elements are that the Government has to prove, and this is merely saying that certain things do not constitute proof, and this has been given as a precautionary instruction substantially in the language suggested in the defendant's request, but it might be confusing to tell them what the elements are in one instruction and then tell them that certain things aren't evidence in another, and I think the way it is covered in the instructions at the last trial, which appeared on page 1458 of the transcript, covers the situation adequately and fairly.

The Court: Well, the only modification I can see in Judge Breitenstein's instruction that I think would fully cover the point they are raising is to add in the body of the instruction there the way it was given, "The law does not compel the filing of such an affidavit," and then I would say something to this effect, that there is nothing wrong or illegal in not complying with that provision of the statute and then stop and let it read like it is the rest of the way, because in the instruction tendered, why, there is no evidence that there are labor organizations which have not complied with Taft-Hartley. I don't think there are.

Mr. Witt: Yes, there are.

Mr. Kelley: There isn't any evidence in this case.

[fol. 1131] Mr. Witt: I thought your Honor was asking just as a matter of information. I think what your Honor said would take care of our second sentence.

The Court: I will do that right now as long as that developed.

Mr. Kelley: That is in there—the law does not compel the filing.

The Court: I know that, but I am just going to say, "Thus, there is nothing wrong."

Mr. Kelley: I see.

The Court: Right after the sentence the law does not compel the filing of such an affidavit I would say, "Thus, there is nothing wrong or illegal in not complying with the Taft-Hartley Act in this respect," and then I would

continue, "The law already provides that the Labor Relations Board." Does anyone see any objection to that?

Mr. Kelley: We have no objection.

Mr. Witt: No, we have no objection. That takes care of the second of the three sentences in our request, but we still want to say a word about the third sentence in our request when you are ready.

The Court: I am ready right now. My own thinking is that that does not, is not accurate and also would be misleading. I do not know what you mean is evidence against the defendant. The evidence is in the case, and the case is against the defendant. It relates to a dozen other theories and circumstances, and I think it would be misleading, that particular sentence. I think the jury, you can argue it, I think the jury would be deceived at least. I have told them there would be nothing wrong or illegal in complying. I think I will refuse it. So, we will number this instruction No. E, requested Instruction No. #. (sic) I am going to say, give second sentence in substance.

Mr. Witt: The record should show our objections only to the Court's refusal to give our third sentence or a rewording of it.

[fol. 1132] The Court: The next one as I pick them up is one which I will designate as "F", as requested Instruction F which reads, "The witness William Mason was an informant for the Federal Bureau of Investigation." The subject of the consideration which can be given to the testimony of informants is covered by the instructions given by Judge Breitenstein which I propose to give again. He used the words "confidential informant", and that will read: "Some of the Government witnesses have been called informants. You can consider this fact in connection with all the other facts relating to such witnesses. It is not unusual for witnesses for the Government in criminal cases to be informants. The fact that a witness has been paid by the Government for acting as an informant whether the payment consists of reimbursement for expenses or per-diem or wages or both may be considered by you along with all the other facts and circumstances in determining the credibility of the witness."

I am refusing this instruction which singles out Mr. Mason for the reason that the general rule I have just stated is applicable to all witnesses who may be in that category and I think states the proper rule of law with respect to the consideration which can be given or should be given their testimony.

Mr. Witt: May I say a word on that for the record?

The Court: All right.

Mr. Witt: Your Honor, if I followed you, the way you would give it would be somewhat confusing to the jury, because your Honor referred to some of the witnesses and also your Honor referred to payment. It happens that the situation in the first trial was different. More than one witness was a confidential informant, and more than one witness was paid. In this case we are talking about only one witness, and there is nothing in the record to show that he was paid. We are talking about Mason. So, your Honor's formulation would be confusing to the jury. I imagine the prosecution would object to that too. It is not based on this record.

Aside from that, two points I make for the sake of accuracy and to avoid confusion, we think our requested Instruction F states the law as to the people in this category more accurately than the paragraph in Judge Breitenstein's instruction which your Honor has indicated he will revise.

[fol. 1133] The Court: Well, I don't think, I don't know of any rule of law, this almost places them in the category of an accomplice, the instruction you tendered, but I do wish to ask the Government about whether that language about payment should be in there. I recall with respect to one witness that he said he got $10.00 I think.

Mr. Kelley: That was the only evidence of any payments other than for statutory witness fees and that sort of thing.

The Court: The way to reach it would be to strike out that about the payment business.

Mr. Kelley: I think so.

Mr. Witt: I should think so.

The Court: And make it read—it is about that one witness, he was paid.

Mr. Witt: No witness was paid.

Mr. Kelley: He says no witness was paid.

The Court: He got $10.00 to pay a babysitter. Who was that?

Mr. Kelley: Gardner.

The Court: I think I will change it to read, the fact that a witness—

Mr. Kelley: —furnished information.

The Court: The fact that a witness furnished information.

Mr. Witt: As an informant.

Mr. Kelley: An informant is one who furnishes information.

The Court: Change it to read, "The fact that a witness has acted as an informant for the Government may be considered by you along with all the other facts and circumstances to determine the credibility of such witness."

[fol. 1134] Mr. Witt: May the record show that we object to it, and we object to the Court's refusal to grant our requested Instruction F.

The Court: The next one pertains to the subject I mean of the witness William Mason. It reads, "With reference to the testimony of the witness William Mason about his telephone call to the defendant in late July," and continues on. That we will mark Instruction G. I know of no principle of law that would make this instruction proper. In other words, the effect of the instruction is to say that an informant's testimony shall not be considered, and I do not think that is the law.

Mr. Kelley: That is what he wants to say.

Mr. Witt: It may not be the law now but it will be.

The Court: Now, the next one I come to is, it starts out, "The witness' testimony about what the witness said in a certain conversation with the defendant," and so forth, I think is argumentative and confusing in the form it is tendered.

Mr. Kelley: It is not a correct statement of the law.

The Court: I would be obliged to refuse it. Do you have anything to say in defense of it?

Mr. Witt: We think it is very neat and artful, your Honor. If your Honor thinks it is inelegant and some-

thing should be given, the law makes it incumbent upon your Honor to rephrase it, otherwise, you are in trouble.

Mr. Kelley: It is covered by other instructions. So far as it has any merit it is covered by other instructions I would say.

The Court: I think the substance of the instruction relates to Mason's testimony. I think the subject is Mason's testimony.

Mr. Kelley: It is argumentative.

The Court: The Court feels that this question of what they may consider and what they may not consider generally is covered by the general instructions. I think I [fol. 1135] will refuse that for the reasons I have indicated. That will be designated as your tendered Instruction H.

I do not think the next one that I will designate as "I", which reads, "In this case you have heard testimony from all the prosecution witnesses relating to periods of time before December, 1951."

Mr. Kelley: That is covered, your Honor, in the instructions of the last trial so far as it is proper.

The Court: I think it is.

Mr. Witt: May the record show up to this point that we object to the Court's refusal to give any of our requested instructions which the Court has refused to give up to this point.

The Court: I thought you had done that.

Mr. Witt: I am not sure. I think I missed the last one.

The Court: I think the matter that this instruction relates to appears in the given instructions at the last trial where it is recited, "The defendant may not be convicted of any other charges than those contained in the indictment. There is some evidence in the case that the officers of the International Union of Mine, Mill & Smelter Workers executed non-Communist affidavits in 1949 and in 1950 and that the defendant Travis was then an officer of the union. This evidence is pertinent only for the purpose of enabling you to determine the state of the defendant's mind, his intent, and whether he signed, made, and used in 1951 and 1952 affidavits knowingly and wilfully with

the knowledge of their falsity. You are not warranted in finding the defendant guilty in this case simply because you find from the evidence that he may have committed other offenses not charged in the indictment."

It seems to me that that instruction covers this problem better than the tendered instruction.

Mr. Witt: We do not think so, but may we hold that until your Honor is done ruling on our requests, and then [fol. 1136] we will go through Judge Breitenstein's instructions considering the respective problems and then consider this one at that time?

The Court: I come to one which starts out, "Under Counts 1 and 2 the defendant is charged with having made a false affidavit on December 19, 1951," and so forth.

Mr. Kelley: This raises the same point on remoteness which the Court has ruled on several times.

Mr. Witt: This has nothing to do with remoteness. This has to do with the intolerable confusion in a case like this.

The Court: What does it purport to do?

Mr. Witt: May I explain it?

The Court: Yes.

Mr. Witt: Maybe this doesn't do it as well as it might. I touched on the problem, if the Court please, in the argument yesterday afternoon when I argued the insufficiency of the evidence, and I don't want to take too much time on it now, but I will explain what we are trying to do in this request by an illustration. Take Gardner's testimony about his conversation with the defendant in October, 1951, which related mainly to what the defendant said about his resignation in 1949. It was in the sense it was admitted as evidence in the case as a kind of admission. Now, is that testimony of Gardner testimony for October, '51 and, therefore, bears on the defendant's guilt as to the first two counts with respect to December, '51, affidavit or is it testimony which goes to the good faith of his resignation in August, '49, or the can't-resign theory or what? And the same with other pieces of evidence. But I think that is a good enough illustration.

The Court: I think on the basis of that the instruction will have to be refused as being I think confusing and misleading probably in the form stated, and I don't think it

is on an accurate premise because the evidence you are talking about is evidence in the case. It is a fact and circumstance that must be considered along with all the evidence in the case, and I don't think you can isolate any portion of any witness's testimony and say that this can only be considered as applying to this period or that period. [fol. 1137] Mr. Witt: Let me say this so our position is clear: Take, again, this piece of testimony of Gardner, we have four counts in this indictment, two with respect to the year '51, the month of December, and two with respect to the month of '52, the month of December. How does this jury know how to deal with that testimony of Gardner in terms of the two sets of counts? Is that testimony that bears on the defendant's guilt in '51 or in '52 or in both years?

Mr. Kelley: Both years.

The Court: Any attempt on the part of the Court to control the inferences the jury may draw from the evidence would not be proper. Now, this instruction will be numbered "J" and will be refused for the reasons I have just indicated. The next one I pick up starts out, "Unless you find beyond a reasonable doubt that the alleged false, fictitious and fraudulent statement and representation made by the defendant are material," we will designate that instruction as "K". This clearly and obviously to the Court in the last three paragraphs does not state the law as I understand it to be. This matter came up yesterday in connection with the defendant's motion for acquittal, and this theory at that time was advanced by the defendant as the basis for acquittal, and I am satisfied that these last three paragraphs do not state the law as I understand it to be.

Mr. Witt: All right, your Honor. You just referred to the last three paragraphs. Does your Honor care to make a statement with respect to the first paragraph?

The Court: I was going to ask the Government with respect to the first paragraph. I mean you have alleged that this was a material false statement or false, fraudulent or fictitious, whatever it was, the language of the indictment. I think that is one of the elements of the of-

fense, isn't it, the materiality, under your allegations of the indictment?

Mr. Kelley: I don't believe it is mentioned. The only thing is I thought the Court had found as a matter of law—

The Court: I don't find as a matter of law. I didn't [fol. 1138] find anything. I held there was evidence that showed it was material simply. That is what the argument was about yesterday. I noticed, I am not too familiar with these instructions, that the word wasn't used in these instructions that were given at the last trial, and I think all it requires to be done is to put the word "material" in the elements of the offense, "material statement", that is the way you have alleged it in the indictment.

Mr. Kelley: Yes. Let us think about that just one minute.

The Court: Anyway, we will come back to that, but the instruction will be refused on the basis I have just indicated. The instruction as tendered will be refused on the basis I have just indicated. That is Instruction K.

Mr. Witt: You say on the basis you have indicated that you will give the first paragraph?

The Court: I said that the last three paragraphs didn't state the law as I understand it to be, and, of course, the instruction tendered as a whole I am asking the Government to check on this question about what properly should be said about the materiality allegation here, whether it is an element of the offense. We are coming back to that.

Mr. Witt: Our first paragraph is open?

The Court: Yes, we will come back to that. Now then, the next one is one that starts out, "Membership in the Communist Party is a different status than affiliation with the Communist Party." That remainder of the instruction, that same sentence I think is already included in another instruction which will be given, but the remainder of the thing gets to this question and raises in another way this question about election.

Mr. Kelley: And repugnancy.

The Court: The Court ruled on it yesterday in effect. Under the language of the Court of Appeals in the first trial of this case I think that this is a matter that will have to be considered after the verdicts are returned if there is any difficulty along that line. So, it will be refused on that basis. It will be marked as Instruction No. L.

[fol. 1139] Mr. Witt: Just one minor typographical change. In the fourth line from the bottom which reads, "Under either count," it should not be the word "counts". That should be the singular the same way as it is over here. It should be, "Under either Count 1 or 2."

The Court: Strike out the "s" from the word "counts".

Mr. Witt: Yes. We object to this one. We are not finished with "K", but I do not think I stated for the record that we also object to your Honor's refusal to charge the jury as we request—strike that. We are coming back to "K".

The Court: We are not coming back to "K". We are coming back to the principle in the first paragraph but not to Instruction K.

Mr. Witt: All right. Then I had better make the record on that. We object to your Honor's refusal to charge as requested in Instruction No. K and in Instruction No. L.

The Court: The next one I have will be marked No. M, and it reads, "With respect to each of the four counts you must find beyond a reasonable doubt not only that the statement of the defendant was false but the defendant knew it to be false at the time he signed the affidavit," and then it continues on with some other matter. Of course, the instruction given covers what the elements of the offense are in which these are included, the fact the statement was false, and this instruction in effect just isolates two of the elements of the offense, and I do not think that is proper. I think the instruction given covers the thing in so far as at least that first paragraph goes, and the next one is simply an expansion of that theory.

Now, the last paragraph I do not quite understand the purport of that.

Mr. Witt: Actually, this instruction ties in with the last paragraph in our request on membership which is Defendant's requested Instruction No. B, and the last paragraph in our request on affiliation which is Defendant's requested Instruction No. C. The last paragraph in Defendant's requested Instruction No. M gives the jury the rule of law and how you determine the mental state in this case belief.

[fol. 1140] The Court: My impression is that the instructions given by Judge Breitenstein which I propose to give,

as I have indicated, clearly pointed out the elements of the offense and the necessity of proving them beyond a reasonable doubt and all of those things and also went into considerable detail into the proof of intent and the things that surrounded that so that I think the subject of this instruction is already covered, and after we go over the Court's instructions, if you want to point out anything that is not covered, we might come back to it. I will lay it aside.

Mr. Witt: We object to your Honor's refusal to give Defendant's Instruction M.

The Court: I will come back to it, but I think, as I have indicated, it is covered in proper form by the other instructions in somewhat of proper sequence, whereas, this picks out this element and that element separate from the proper instructions. The next one I have I will designate as "N", and that reads, "The only person who is on trial in this case is the defendant Maurice E. Travis." Now, that first paragraph is very similar in language and content to an instruction I propose to give which was given at the last trial which reads as follows: "The only person who is on trial in this case is the defendant Maurice E. Travis. None of his counsel, none of the witnesses or any other persons associated with the defense are on trial. The International Union of Mine, Mill & Smelter Workers is not on trial. Many references during the trial have been made to this union. This testimony is only pertinent and admitted for your consideration as it bears on the issues here regarding the truth and falsity against the defendant Travis. The only issues for you to determine are the guilt or innocence of the defendant Travis on each of the four counts of the indictment." So, I think that first paragraph is very adequately covered. It is almost verbatim.

The second paragraph I do not think is proper. I do not quite understand what he means.

Mr. Witt: Well, you recall, your Honor, that we objected to Eckert's statement on my cross examination about the nature of the CIO hearings. So, we are just preserving our record on it in view of the fact that your Honor denied our motion to strike that piece of Eckert's testimony. We think in order to carry through our position

[fol. 1141] we have to request that your Honor charge along the lines of this paragraph.

The Court: All right. It will be denied, that particular request, and this instruction will be refused on the basis that the first paragraph is covered almost verbatim by the instructions that I will give, and that the second paragraph I do not believe states the law or is proper.

Mr. Witt: Your Honor, it is important to say another word or two on the first paragraph.

The Court: All right.

Mr. Witt: If I followed your Honor, you intend to give a charge more or less the same as Judge Breitenstein did on this problem especially since your Honor stated that you would instruct the jury that Travis's counsel is not on trial, none of the witnesses are on trial, and any other person associated with the defense is not on trial. Now, that sentence in Judge Breitenstein's instructions, which appears in the transcript of the record on appeal on page 294 was embodied because of the particular events which took place during the first trial.

You remember in connection with our motions for mistrial in connection with Eckert's testimony about the naming of counsel—

The Court: If you wish to have that sentence left out, that is perfectly agreeable to me.

Mr. Witt: Yes, because it will inject counsel on this record. Also, the situation with respect to the witnesses was somewhat different, but that is not important.

The Court: I will strike out that sentence. I didn't know the reason it was in there. It is all in the same sentence. I will strike that sentence.

Mr. Witt: That is because one or two of the Government witnesses in this case feinted a person who was helping defend, and defense counsel—

[fol. 1142] The Court: "The only person who is on trial in this case is the defendant Maurice E. Travis," and then the International Union of Mine, Mill & Smelter Workers is not on trial. That part I guess is all right. That completes the tendered instructions submitted by the defendant except "M" and "I" which I am holding out for a comment as we go through these other instructions.

Mr. Witt: I am sorry, before we get away from the record on this may the record show that we object so far as your Honor's proposed instructions are different from our request.

The Court: You asked me to hold it out or I wanted to see if there was anything in there that wasn't covered in the instructions Judge Breitenstein gave. Let's proceed to the instructions Judge Breitenstein gave which you have examined and have before you. If you will go down through them and point out anything that you think that was wrong or that you wish to except to at this time.

Mr. Witt: All right, sir. Your Honor, I am using the transcript of record on appeal.

The Court: I am using a different one, and they have a different one. The only thing we can do is go to the place you have in mind.

Mr. Witt: We will find it without difficulty. It will go continuously from the beginning to the end of the charge. First, we object to the charge on circumstantial evidence which being near—

The Court: I have found it. "The jury may convict upon circumstantial evidence as well as on direct evidence."

Mr. Witt: 286 of the record on appeal, and that is based on our motion on the perjury—or position on the perjury rule, so, I need not say anything more about it. Your Honor has in effect ruled on it.

The Court: You are objecting to it on the basis that you think the rule applies in perjury cases should apply here?

Mr. Witt: Yes.

[fol. 1143] The Court: Your objection on that basis will be denied.

Mr. Witt: Then, four paragraphs below that the so-called informer instruction, we have made the record on that. Your Honor has denied our request on that. Then quite a few paragraphs after that at page 289 of the record on appeal where Section 1001 is quoted. The paragraph being, "The Federal statute which the defendant is charged with violating is 1001."

The Court: I have found it, "The Federal statute which the defendant is charged with violating Section 1001."

Mr. Witt: You notice that only a part of 1001 is quoted, and we think this is not too important but because of our position on materiality we think that the entire Section 1001 which is not much longer should be quoted.

The Court: That is verbatim statement of 1001, isn't it?

Mr. Kelley: Well, there is just a little of it. I have got it here.

Mr. Witt: He has left out the so-called first clause which is not involved in this case.

Mr. Kelley: You think it ought to be in there?

Mr. Witt: Just to make the record complete, yes, because of our point on materiality.

Mr. Kelley: The statute reads, "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000," and so forth.

The Court: That brings up the thing that I would like to get the Government's notion on. Yesterday it came up, and it came up again today on this one instruction that we mentioned a moment ago. This indictment has that [fol. 1144] word "material" in there. What in your viewpoint is the effect of that? I mean where are we on that? I guess it was the same indictment at the last trial, and, yet, apparently this question didn't come up.

Mr. Witt: May I say since your Honor asked that question before we would like to answer that and explain why it didn't come up, your Honor. In the sense—in a sense I indicated why in my argument on materiality yesterday afternoon. On the first trial it did not come up because we stipulated as to materiality, and the stipulation as to materiality became part of the record, and, therefore, it wasn't important to us in connection with the instructions. We had conceded it, and we didn't pursue it.

Now, that, as we see it, there is no evidence in this record as to materiality we are pursuing it, and, therefore,

we think the charge which we have proposed on materiality should be given.

The Court: How would the fact you have stipulated to it change the law in any respect regarding the elements of the offense? The stipulation merely establishes a fact.

Mr. Witt: Just in this sense, your Honor. I think this will answer you. This will illustrate the best in terms of Judge Breitenstein's charge. If you will turn now a couple of pages beyond the point we are just discussing where he quoted from Section 1001 and go to the paragraph beginning, as follows, "To return now to the four elements which must exist for there to be a violation of the statute." I will wait for you to find that.

The Court: I have found it.

Mr. Witt: I am sorry, go to the two paragraphs before that one beginning in this case, "Counsel have stipulated."

The Court: I have found that.

Mr. Witt: Now, at the end of that paragraph, the paragraph which begins in this case, "Counsel have stipulated," at the end of that Judge Breitenstein stated after he stated the other parts of the stipulation that, "That the Board [fol. 1145] acted upon them," and therein he referred to that part of the stipulation which took care of materiality. Therefore, when he came to the element of the offense two paragraphs below and he referred to the four elements he found it necessary to discuss only two of them, because the other three were out of the way including materiality, and we didn't press it, your Honor, because it was a lost cause. We didn't make a fuss about it. We stipulated before trial, we did on this trial. We told Mr. Kelley, as I said yesterday, we would stipulate on it, but the difference is that in the first trial that stipulation was made part of the record, and in this trial it has not been made part of the record.

The Court: I cannot see, Mr. Witt, that would follow anything with respect to the elements of the statutory offense or of the elements in the trial. If it had been admitted as a matter of fact, that is all a stipulation is, is something that is agreed upon as a matter of fact. That would do away with the proof on the subject, but it still would say, it would remain one of the elements. For in-

stance, to illustrate what I mean, if that was considered an element of the offense, why, Judge Breitenstein in that paragraph following that, the first one you referred the Court to, would have said the materiality was conceded. There is no mention made throughout the other instructions with regard to the necessity of establishing by stipulation or proof this question of materiality, and my impression is, and I wish referring to the express language that you just pointed out here in this instruction, "That the Board acted upon them," I thought that was in the record right now, when they sent out that letter that you read yesterday.

Mr. Kelley: They were in compliance. That's right, the Board did act on it.

Mr. Witt: We argued that yesterday. We disagree with that, but just on your Honor's point about Judge Breitenstein's instructions on the elements of the offense your Honor is absolutely correct that it wasn't spelled out correctly, but to us on the first trial it was academic, your Honor, so, we didn't press it, because in the same way that we had stipulated to the whole compliance picture including the six exhibits we stipulated that the Board acted upon the affidavits which took materiality out of the case, and, therefore, when Judge Breitenstein went on to [fol. 1146] spell out the elements of the offense without referring to materiality there was no point in our fussing about it. His statement that there was a stipulation about it took care of it, and what was the use for us to ask him to be more exact? It could not do us any good in that record. But on this record we say it is entirely different, and on the specific point we just came back to we say letters of compliance do not take care of the materiality point.

The Court: It wasn't before considered to be an element. The materiality wasn't before considered to be an element.

Mr. Kelley: That's right. We think the fact that the word "material" in there is surplusage under the statute and doesn't add or subtract anything from the elements—

Mr. Witt: There is no use of renewing the argument we made yesterday. It is important, it is of the greatest importance to us on this technical point to keep making

our record at the appropriate points, and I will say again in view of that statement of Mr. Kelley, that Mr. Kelley just made, as I said yesterday afternoon that the word "material" may or may not be surplusage under the cases I referred to yesterday, but at this stage of the game the Government can't argue it is surplusage, because, if it had been omitted from the indictment, it would have been open to us to make an argument to the motion to dismiss under the Rolland case, the leading case, which holds that it is not surplusage and that it is an essential ingredient to the offense and has to be pleaded in the indictment.

The Court: What is your position about it?

Mr. Kelley: Well, your Honor, I can't see that it is any different now than it was last time under the statement by the Court. He said that we had stipulated that Travis had executed the affidavits, he had mailed them or caused them to be mailed, they were received by the Board and the Board acted upon them. That is what they did here. They acted upon them and notified the union that they were now in compliance and were free to use the facilities of the Board.

Mr. Witt: That is not acting upon them. Under what the Government, itself did, as I pointed out yesterday, on the first trial here getting this stipulation that Mine-Mill used [fol. 1147] the Board, the Government approved it beyond mere compliance. In the Gold case as we showed by argument of Government counsel, opening statement of Government counsel in the Gold case, as was disclosed yesterday from the Jencks record, the Government proved not only by a witness but by an exhibit beyond the so-called letter of compliance. So, the letter of compliance is not sufficient proof that the Board acted upon the affidavit.

The Court: I am not so much concerned about that. What my problem is and what I wanted to get the Government's position on is whether it should be said in this case that as an element of the offense it must be established that the affidavit was fraudulently materially or however it was alleged there in the indictment.

Mr. Kelley: That is what I was looking for, to see if I could find the indictment here. It says nothing—well, it

says, "Knowing the same to contain a false, fictitious and fraudulent material statement."

Mr. Witt: It is in every one of the four counts.

Mr. Kelley: All that would need to be done to correct it, as I see it, would be under the first part where the Judge states, "It remains for you ladies and gentlemen of the Jury to determine whether, one, the affidavits contained a material false fictitious or fraudulent statement," or whatever the order is, "a false, fictitious, and fraudulent material statement,"—just insert "material".

The Court: That is what I thought when I read it over. The place he is talking about, right after the part we were reading, is that the one? "The affidavits contained a false, fictitious or fraudulent material statement" would be the way it would read, and, two, "That the defendant made and used the affidavits with the knowledge that they contained a statement that was false, fictitious or materially fraudulent," or however the adjective would be.

Mr. Kelley: "Contained a material statement."

The Court: Yes, "Contained a material statement that was false, fictitious, and fraudulent."

[fol. 1148] Mr. Witt: We have in support of our position to be consistent, we have quite a few changes to make in Judge Breitenstein's charge on this. I am ready with all of them aside from our insistence that our requested instruction can, not only the first paragraph but all four paragraphs are proper with respect to this matter.

The Court: Well, we were down—you may go ahead with your specific objections.

Mr. Witt: All right, sir. Now, getting back to Judge Breitenstein's charge, the point where we left it, I had proposed that instead of the partial quotation of Section 1001 the entire section be quoted. I do not think that is too important but to give a little consistency.

The Court: You read it to me.

Mr. Kelley: Well, it leaves out this part about willfully falsifies, conceals or covers up by any trick, scheme or device a material fact. That part is not pertinent to the charge here, and I think it might be confusing to the jury. The only applicable portion of the statute need be given I should think.

The Court: I will look at that instead of arguing about it.

Mr. Witt: May I make clear why we suggest that?

The Court: Yes.

Mr. Witt: It is because of our position on materiality especially in light of the opinion in the Freidus case which I quoted from yesterday. We can call the first clause of 1001 the concealment clause and the clause which is involved in this case, the false statement clause. The word "material" is contained only in the concealment clause.

Mr. Kelley: As to a material fact.

Mr. Witt: But the Freidus opinion reaches the conclusion that nonetheless even though the word "material" does not appear in the false statement clause that "material" modifies the false statement clause as well, and, therefore [fol. 1149] in order for us to be logically consistent in our position throughout the charge we think the concealment clause of 1001 with the word "material" should also be quoted.

The Court: I will look at the statute. I mean putting the whole statute in would rather complicate the thing because there is no contention of concealment or anything like that in this case, and what Judge Breitenstein was doing was picking out the section that he contemplated contained the elements here. If the Government introduced this material element by the indictment, I think it will be proper as I just suggested to put that in as one of the things they have to prove, but I don't know that it would be here, but the record as far as you wish to make it perfectly clear about your position, that is proper, but I will look at the statute and see whether the rest of it can be read or what. We generally try to read only the part that is pertinent to the case usually. What is your next objection?

Mr. Witt: This is a whole series going to the same issue, your Honor. Then after quoting from the statute the charge goes on to say, "For violation of this statute to occur there must be," and then there are four elements given the jury. Now, we say that the fifth element must be added dealing with materiality. Again, we say we didn't press this point on the first trial because it was a lost

cause, but now it is not, and we think especially, if your Honor is going to charge that materiality is an essential element to the offense, it will have to be included as a fifth element at this point.

The Court: It could be put in the third one.

Mr. Witt: It doesn't matter, say "a false, fictitious, and fraudulent material statement", the way you alleged it was.

Mr. Kelley: It is, "a false, fictitious, and fraudulent material statement."

The Court: Put "material" in there.

Mr. Witt: Of course, we think it would be better if it was separated out, but it doesn't matter.

[fol. 1150] The Court: The next one "with knowledge that such statement—"

Mr. Kelley: "—was false, fictitious or fraudulent." I think you don't need knowledge of the material part of it.

Mr. Witt: No, we don't say that as long as we put it in the number three.

The Court: What is the next one?

Mr. Witt: The next one is four paragraphs down, the paragraph in which the charge refers to the stipulation, the one I have mentioned a little while ago. In this paragraph the charge begins by saying, or the paragraph being at this point begins by saying in this case, "In this counsel have stipulated," and then it goes on and concludes by saying, "and that the Board acted upon them." Of course, that is not true on the basis of this record.

The Court: That is why we don't agree.

Mr. Kelley: We certainly don't agree with them.

The Court: There may be—

Mr. Kelley: What he is saying is—

The Court: As I understand what he is saying and what you are saying there may be a choice of words here. You contend that that letter which they stipulated to shows that the Board acted upon the affidavits. He is contending that it didn't show that.

Mr. Kelley: Yes, he claims that this refers to the union using the facilities of the Board, and, if you read this language, it is very clear the Court says they mailed the affidavits in, the affidavits were received, and that the

affidavits were acted upon. Well, the letter itself shows they were acted upon and placed the union in compliance. That is the purpose of the affidavits.

Mr. Witt: The record has to be clear at this point, because Mr. Kelley is very, very badly mistaken. So, I must [fol. 1151] go back to the record on the first trial.

The Court: I am not so much concerned about that. I recall about that. The whole question here, all you're objecting about is that statement that the Board acted upon them. Does this letter you have stipulated to imply that the Board acted on the matter of the affidavits?

Mr. Witt: No. That is why your Honor must permit me, otherwise, we are not being permitted to be heard on this, your Honor, we are not understanding each other. Your Honor, I refer to page 18 of the typewritten transcript of the first trial, the paragraph I referred to yesterday: "It is further stipulated that during the life or the effect of the two affidavits, Exhibits 1 and 4, that the International Union of Mine, Mill & Smelter Workers used the facilities of the National Labor Relations Board," and Mr. Kelley made that statement for the record after we had dealt with the first six exhibits dealing with compliance. So, there is absolutely no question on the basis of the record in the first case that Mr. Kelley's position was that the letters of compliance didn't take care of the materiality problem, that he had to get this further stipulation embodied in the paragraph I just read to the effect that Mine-Mill used the facilities of the National Labor Relations Board.

The Court: It doesn't say anything about the union complying with or using the facilities. It said the Board acted upon them.

Mr. Witt: When you say "this" what are you referring to?

The Court: I am referring to what you are objecting to, the words that I understand you are objecting to in the instructions "and that the Board acted upon them."

Mr. Witt: I am saying that Judge Breitenstein's clause there that the Board acted upon them referred not to the letters of compliance but to this paragraph on page 18

which I just read, the stipulation that the union used the facilities of the National Labor Relations Board.

The Court: That is what I am trying to find out.

[fol. 1152] Mr. Kelley: May I read the letter? The letter is, "Dear Mr. Clark: This will acknowledge receipt of your letter of December 21, 1951, enclosing compliance material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act ,1947. The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until June 30, 1952, and under Section 9 (h) until December 7, 1952, provided there are no intervening changes in your officers. Our Regional and Sub-Regional Offices have been notified of your renewal of compliance." They acted on it.

The Court: I agree with you. I think this is accurately stated in Judge Breitenstein's instructions, and I will give it the way he gave it. I don't think there is any implication that the union availed itself of the facilities or anything else. He simply said and I think the fact is the Board acted upon them by sending that letter and showing the status of the Union.

Mr. Witt: We have made our position clear.

The Court: Yes. What is the next one?

Mr. Witt: Two paragraphs after the one we were just discussing which begins, "To return now to the four elements in the same way as we made—"

The Court: I am going to put in the word "material" there. The only thing I have seen I do not agree with what Judge Breitenstein, I think it has to be submitted to the jury whether he acted knowingly and wilfully in filing them as a matter of fact. I mean it will be a third element added that the affidavits were filed knowingly and wilfully, something like that.

Mr. Kelley: Well, he says, to return now to the four elements which must exist for there to be a violation of the statute—

The Court: It may be the use of his language.

Mr. Kelley: It is clear that this matter is a matter within the jurisdiction. It has to appear.

[fol. 1153] The Court: If they have no objection to it being stated in this form—

Mr. Witt: Yes, they were filed knowingly and wilfully. That is not an issue.

The Court: I won't change it. I will use this form then. What is your next one?

Mr. Deikman: Well, your Honor, I think that Mr. Witt is suggesting a change in the listing again in that paragraph.

The Court: I am putting the word "material" in the paragraph.

Mr. Deikman: Instead of the word "four" the word "five".

Mr. Witt: Well, just something you will do anyway, your Honor, the membership and affiliation instruction, all those paragraphs will be out you have decided?

The Court: Yes, they will all be out. I am going to put in this new one.

Mr. Witt: Then, your next point is on page 293 of the record on appeal, it is the paragraph that beings (sic) with the following sentence, "The defendant may not be convicted on any other charges than those contained in the indictment." That is the paragraph which refers to his executing affidavits in '49 and '50. Your Honor referred to it a while ago.

The Court: Yes.

Mr. Kelley: You have one problem on that, and that is that there was evidence on the policy changed in 1949 and that it never changed again. I mean it remained a policy of compliance.

Mr. Witt: No, sir. Let me make my point which goes to that.

Mr. Kelley: May I say it makes no difference whether you leave 1950 in as far as we are concerned if you feel it should come out.

[fol. 1154] Mr. Witt: So that Mr. Kelley gets the point and your Honor will follow, in that paragraph you will notice that reference is made to the filing of affidavits by all the officers including Travis in '49 and '50. There was evidence as to 1950 in the first case on the first trial but not in this trial as Mr. Kelley apparently just agreed.

In this trial the evidence only goes to 1949, and there is no evidence that affidavits were filed by—

The Court: Then the first thing to do is strike out "and that 1950".

Mr. Witt: That is one change.

Mr. Kelley: It doesn't make any difference to us except we had evidence that the policy changed and that is evidence by the defendant's own statement in the newspaper policy, the union had decided to comply. Then there is nothing on this continuance theory, is what I am thinking about, there is nothing to show that there was any change about that, and you get up to 1954 and you have an election. So, I mean it is immaterial as far as we are concerned.

The Court: Let's see what he would like to have changed.

Mr. Witt: Mr. Kelley is anticipating me. Let me make the suggestion that we think are called for. So, those words "and in 1950"—

The Court: I have stricken that.

Mr. Witt: They go out. Then, the last sentence in that paragraph refers to evidence that the defendant may have admitted other offenses not charged in the indictment. "Offenses" appears there in the plural because Judge Breitenstein was referring to two years but now that we are referring only to 1949—

The Court: That ought to be singular. "That he might have committed an offense not charged in the indictment", and I think it will make it clearer, change the period to a comma and say, "That is, an offense with respect to his 1949 affidavit," is that it?

Mr. Witt: Yes, and then I have a more basic point.

[fol. 1155] The Court: "You are not warranted in finding the defendant guilty in this case simply because you find from the evidence that he may have committed an offense not charged in the indictment and that is with respect to his 1949 affidavit. Is that right?

Mr. Witt: "An offense with respect to", I think that is a little smoother.

The Court: Leave out the "Not charged in the indictment".

Mr. Kelley: "An offense because—"

Mr. Witt: "An offense with respect to his 1949 affidavit."

The Court: See if I have it right: "You are not warranted in finding the defendant guilty in this case simply because you find from the evidence he may have committed an offense not charged in the indictment, that is, an offense with respect to his 1949 affidavit."

Mr. Witt: Yes, sir. Now, up to that point we are more or less agreed. Now, we come to what I think is a more basic problem on this paragraph.

The Court: This is that expert business.

Mr. Witt: No, sir, it is the same paragraph I am talking about. The expert business is the next paragraph. I am talking about the paragraph we have just been revising, and I am referring to the third sentence reading or beginning, "This evidence is pertinent only for the purpose."

The Court: All right.

Mr. Witt: Now, we say that sentence should come out. A moment ago in anticipating this problem Mr. Kelley referred again to the presumption of continuance, because he said there is evidence that there was compliance in '49 and that it continued until 19—at least past—

The Court: I am inclined to think, I see your point, just in an effort to make a little time, you are objecting to this specific reference to '51 and '52, and "This evidence [fol. 1156] is pertinent only for the purpose of enabling you to determine the state of defendant's mind and his intent," you would not have any objection to that phrase?

Mr. Witt: Yes, that is what I was coming to.

The Court: Then I think that is all right, and I will strike out then, "Had he signed and made and used the affidavits knowingly and wilfully with knowledge of their falsity."

Mr. Kelley: I think that is a good statement of the law.

Mr. Witt: Not on these facts, and I haven't been able to make my point. Just let me say this.

The Court: Go ahead.

Mr. Witt: Even if Mr. Kelley was right in his argument on the presumption of continuance with respect to the resignation and the pre-August, 1949, membership, he is clearly wrong in arguing, if that is what he is arguing, that the presumption of continuance applies here, because

your Honor will recall that the affidavits have to be filed each year, so, we are not talking about the continuance of a condition or a status in a sense in which the case discusses the presumption of appearance. This has to be an affirmative act renewed every year.

So, the fact that there is evidence there was compliance in '49 and '51 and '52 and '53 encompassing the March, 1954 election in Montana doesn't permit an inference or a presumption that there was compliance in the year 1950, and, therefore, we say that this third sentence in this paragraph doesn't correctly state the law, because you can't say that the fact that Travis and the other officers filed affidavit in '49, but taking Travis alone throws any light on the state of the defendant's mind and his intent and so forth with respect to '51 and '52 when you have got the 1950 gap.

The Court: I do not know that I agree with that theory.

Mr. Kelley: I think, if you take out "and in 1950", that that is a good statement of the law. It is a prior offense.

The Court: I don't see, I don't believe that that would [fol. 1157] warrant the implication that he puts on it. I think as I presently advised that I will leave it like it is but strike out the 1950 and change this other sentence the way you are talking about.

Mr. Witt: All right, we have made our position clear on it.

The Court: What is the next one?

Mr. Witt: The next paragraph, of course, on expert witnesses is out, but that speaks for itself, your Honor.

Mr. Kelley: What do you mean, Mr. Witt?

Mr. Witt: We have no expert.

Mr. Kelley: No expert?

Mr. Witt: No experts in this case.

Mr. Kelley: It ought to be in the singular.

The Court: It is going to be singular.

Mr. Witt: Who is the singular, Eckert?

Mr. Kelley: That is the only possibility, and he testified as to a fact.

Mr. Witt: Not as an expert. We went through that whole thing.

Mr. Kelley: If defense counsel is willing that that one on expert testimony come out, why, the Government—

The Court: Do you wish that instruction on expert testimony?

Mr. Witt: We think the whole thing is out. There is no expert testimony. We went through that whole thing about Eckert so that his answer about the can't-resign policy, theory was not based on his qualifications as an expert.

The Court: I think I will give it and limit it to singular. That is my present thinking.

[fol. 1158] Mr. Witt: We object to it. Mr. Kelley will agree that the two paragraphs about the cross examination of the character witnesses should go out.

Mr. Kelley: I do not believe we asked him those questions this time.

The Court: What is the next point you have?

Mr. Kelley: You took the one out about the Fifth Amendment.

The Court: Yes. There are two full paragraphs I have taken out.

Mr. Witt: That is it.

The Court: I think I laid aside these instructions, "M" and "I", I think the provisions of "M" are covered by the instructions to be given. We have just gone over it. The instructions cover his intent, proof of it, and all about how it is manifested by the accounts and statements and all of that. I think I will refuse "M" on the ground it is covered in the instructions in so far as it is proper.

Mr. Witt: We object to it, but we have made our position clear when we discussed it earlier.

The Court: Then that leaves "I" still in the mill, and this is entirely independent of this but prompted by the dating I wish you would find out before we leave here, had that date ought to be the 26th of December or the 19th of December?

Mr. Vincent: It is the 26th of December.

The Court: It says December 19, and I am talking about that instruction on membership you gave. You have the date December 26.

Mr. Vincent: That is the date in the indictment.

Mr. Kelley: Both dates are in the indictment.

The Court: The date they have used all through the other instruction is and the ones the defense has been using are these, December 19 and December 3.

[fol. 1159] Mr. Vincent: He executed the first one in '51 on the 19th, and he started the filing process on the 26th. It was received by the Board on the 28th.

The Court: What I am getting at is that Judge Breitenstein used the date all the way through as December 19.

Mr. Witt: Why don't we do that to be consistent. There is no issue about it, just for clarity.

The Court: We will change it to the 19th.

Mr. Kelley: By agreement of the parties we are using the 19th. I suppose you could technically use the period of the 19th to the 26th, I don't know.

The Court: The indictment says he signed the affidavit the 19th.

Mr. Vincent: The date it was executed was the 19th.

The Court: What do you have to say in defense of "I"? I thought it was covered by the instructions. We fixed that part that he wasn't on trial for the 1949 business.

Mr. Kelley: I thought "I" had been covered.

The Court: I passed it. I said I thought it was covered, but I said we would look at the instructions. It relates to the matter we were just talking about.

Mr. Witt: Your Honor has covered it. We would prefer it in this form.

The Court: I will refuse it as being covered already by another instruction.

Mr. Witt: The record may show that we object to it, we prefer it this way.

The Court: I believe that is all.

Mr. Witt: Will your Honor dispose of our requested Instruction No. K?

[fol. 1160] The Court: As I understand, the only matter reserved was with respect to the first paragraph, and as we have gone through the instructions that were given at the first trial I have upon the basis of the contentions of the defense placed in the elements of the offense and then the elements that the Government must prove beyond a reasonable doubt the statement "material statement" or

"fraudulent material statement" or however it read, and consequently, I have also told them that they must be convinced beyond a reasonable doubt that all of the elements concur before there can be a conviction where the subject of this first paragraph is covered.

Mr. Witt: Our position is, your Honor, that in addition to the changes your Honor has indicated which your Honor just referred to that our requested instruction number K should be given, and we object to your Honor's refusal to give it.

In Chambers

The Court: Before proceeding with the arguments I thought it advisable to have a conference with counsel and have asked counsel to come to Chambers. I am going to give the instructions almost verbatim along the line that were given in the other trial except for the changes that were made yesterday, and among other things I think I will give the Statute 1001 in the same form that Judge Breitenstein did but, of course, have added the word "material" as we agreed upon yesterday in the elements of the offense. Also, after reviewing the Government's instruction on membership I am giving it in almost precisely the form that it was tendered, and, likewise, the instruction with reference to affiliation will be given in the form tendered except for the deletions that we talked about yesterday. We eliminated a paragraph here and there.

As I mentioned yesterday, I had thought possibly to avoid a recess at the conclusion of the instructions to enable the defense to make objections and exceptions to the instructions to possibly have the two new instructions, if they might be called that, the one on membership and affiliation, so that I could read them and the objections would be made here this morning. But due to the fact we didn't finish the session yesterday afternoon until rather late and my secre- [fol. 1161] tary hasn't completed the draft, but I am sure from what I said about the instructions that I will give in the case that you are all familiar with the old instructions and with these two new instructions, and I think we may proceed with the arguments, and then after I have finished the instructions, why, we will have a recess and the excep-

tions can be made. The Rules provide that opportunity shall be given the defense to make objections before the case is submitted to the Jury. So, I think we will proceed on that basis.

One other thing that I wish to mention that I think probably would be followed anyway, and that is I prefer not to have counsel say, "The Court will instruct you," and then read from anything, but say that you expect the Court to instruct or something like that.

Mr. Witt: I understand. I think that is the usual procedure.

The Court: I have the forms of verdict. I would like to have counsel check them over to see that they are in proper form.

Mr. Witt: While Mr. Deikman is looking at those forms although I am sure the record is clear, just out of an abundance of caution may the record show that we object or we will object if your Honor does not quote Section 1001 in its entirety. I understood you to say a moment ago that you will just quote the part of it that Judge Breitenstein quoted. Also, out of an abundance of caution may the record show that we object to the Court's instructing on the question of membership and affiliation in the way that the Government has requested. Also, I am not sure that the record has been made clear on this in that same connection: We have objected to the membership instruction requested by the Government on the Constitutional ground, and we also stated that in view of the fact that that instruction embodied all or part of Section 5 of the Communist Control Act of 1954 we think the objections to the membership instruction also are valid as to the affiliation instruction, but we want to make it clear in saying that.

We also intend to say that the Constitutional objections we have to the membership instruction, to-wit, with respect to the First Amendment, the Fifth Amendment, and the [fol. 1162] Sixth Amendment also, therefore, go to the affiliation instruction.

The Court: Very well, those objections will be noted, and it also can be shown that they are overruled, and the Court will proceed on the basis that I have indicated.

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[fol. 1220]

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the Jury, you have patiently listened to the evidence in this case and the arguments of the lawyers. It now becomes the duty of the Court to instruct you as to the law which will govern your deliberations in the case. This has been a long trial. The strain upon all concerned, the jury, the lawyers, and the Court, has been more than ordinary, and I want to congratulate you upon the patience and attention that you have shown throughout the trial.

During the trial it has become necessary to take several recesses to enable counsel to argue questions which the law requires must be presented to the Court out of the presence of the jury. The delays and interruptions due to these recesses were unavoidable and occur in some degree in every trial. You, therefore, should hold no one responsible for these delays and the interruptions in the actual trial proceedings and give no consideration whatsoever to them in your deliberations.

As I have already told you, it is your duty as jurors to follow the law as stated in the instructions of the Court. It is solely the province of the jury to determine the facts on the evidence presented. In so doing it is the duty of the jury to accept the law as given you in these instructions.

No single one of these instructions states all the law applicable to the case. All of the instructions must be taken and considered together as they are connected with and related to each other as a whole.

At the outset, you should understand some of the well established principles of law applicable to all criminal cases. [fol. 1221] As you know, this is a criminal case.

Under our system of government the defendant enters upon the trial in a criminal case with the presumption of innocence in his favor. That presumption of innocence continues and remains with the defendant in his favor during the trial until it is overcome by evidence and guilt is established to the satisfaction of the jury beyond a reasonable doubt. The presumption of innocence alone is sufficient to acquit the defendant unless the jury is satisfied beyond a

reasonable doubt of the defendant's guilt from all the evidence in the case.

The indictment is no evidence of guilt and must not be considered by you as such. The indictment is merely a formal statement of the offense alleged by the Government to have been committed by the defendant in order that he may know the charges which he must meet. The indictment is not evidence, does not constitute proof, and will be regarded by you only as a statement of the offense.

The defendant in a criminal case is not required to prove his innocence. The burden is on the Government to prove guilt of the offense charged, and every material element thereof, beyond a reasonable doubt. In the event that you have a reasonable doubt as to whether the defendant has been proved to be guilty, then it will be your duty to resolve that doubt in his favor and return a verdict of not guilty as to such counts with respect to which you think that condition attains.

Now, a reasonable doubt is a doubt founded upon a consideration of all the evidence and must be based on reason. Beyond a reasonable doubt does not mean to a moral certainty or beyond a mere possible doubt or an imaginary doubt. It is such a doubt as would deter a reasonably prudent man or woman from acting or deciding in the more important matters involved in his or her own affairs. Doubts which are not based upon a reasonable and careful consideration of all the evidence, but are purely imaginary, or born of sympathy alone, should not be considered and should not influence your verdict. It is only necessary that you should have that certainty with which you transact the more important concerns in life. If you have that certainty, then you are convinced beyond a reasonable doubt. [fol. 1222] A defendant may not be convicted upon mere suspicion or conjecture. A defendant should be acquitted if the evidence is equally consistent with innocence as with guilt.

There are two types of evidence from which a jury may properly find a defendant guilty of an offense; one is direct evidence, such as the testimony of an eye witness; the other is circumstantial evidence, such as the proof of a chain of circumstances pointing to the commission of the offense.

The jury may convict upon circumstantial evidence as well as upon direct evidence if it is so strong and convincing as to prove the guilt of the defendant beyond a reasonable doubt. When the case rests wholly or partly upon circumstantial evidence it must be so strong and convincing as to exclude every reasonable theory and hypothesis of the innocence of the defendant, and when so strong and convincing it meets the requirements of proving the guilt of the defendant beyond a reasonable doubt.

You ladies and gentlemen, as jurors, are the sole judges of the credibility of the witnesses and the weight which is to be given the evidence that has been received in this case.

In judging the credibility of the witnesses as reasonable men and women you may believe the whole or any part of the testimony of any witness or you may disbelieve the whole or any part of it. You should carefully scrutinize the testimony given and in so doing consider all the circumstances under which any witness has testified, his demeanor, and his manner while on the stand. Consider the witness's intelligence, the relation which he bears to the parties interested in the outcome of the action, his interest in the outcome of the case, and the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence if at all. Consider such evidence as there may be relating to the reputation of the witness for truth and veracity. Consider each matter which tends reasonably to shed light on the credibility of a witness.

A witness false in one part of his testimony is to be distrusted in other parts of his testimony. You may reject all or any part of the testimony of a witness who has wilfully testified falsely as to a material point.

[fol. 1223] Some of the Government witnesses have been so-called "informants". You can consider this fact in connection with all other facts relating to such witnesses. It is not unusual for witnesses for the Government in criminal cases to be informants. The fact that a witness has acted as an informant for the Government may be considered by you, along with all other facts and circumstances, in determining the credibility of such a witness.

In weighing the testimony given by former members of the Communist Party or of the International Union of Mine, Mill and Smelter Workers, you should consider whether the circumstances of their membership or of their leaving the Party or the Union might have given rise to some hostility against the Communist Party, or against the International Union of Mine, Mill and Smelter Workers, or against the defendant, or to some self-interest which might affect the accuracy or truthfulness of their testimony.

As I have said, you are the judges of the credibility of each and every witness.

In this case the indictment, as I told you, contains six counts. Two of these counts, Count 3 and Count 6, have been dismissed by the Government.

In the first count of the indictment the Grand Jury charges that, "On or about the 26th day of December, 1951, Maurice E. Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an 'Affidavit of a Non-Communist Union Officer,' executed within the District of Colorado on or about December 19, 1951, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there a member of the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there a member of the Communist Party, in violation of Title 18, United States Code, Section 1001."

[fol. 1224] In Count Two the Grand Jury further charged that, "On or about the 26th day of December, 1951 (that is the same date as in Count One), Maurice E. Travis, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, wilfully and knowingly make and use, and cause to be made and used, within the District of Colorado, a false writing and document, namely, an 'Affidavit of Non-Communist

Union Officer', executed within the District of Colorado, on or about December 19, 1951, which false writing and document the said Maurice E. Travis filed and caused to be filed with the National Labor Relations Board in the City of Washington, District of Columbia, knowing the same to contain a false, fictitious and fraudulent material statement and representation, to-wit, that he, Maurice E. Travis, was not then and there affiliated with the Communist Party, whereas, as the said Maurice E. Travis well knew, he, Maurice E. Travis, was then and there affiliated with the Communist Party, in violation of Title 18, United States Code, Section 1001."

Count Three, as I have told you, has been dismissed.

Count Four is similar to Count 1 except that it relates to a matter occurring in December of 1952. It alleges that the offense occurred on December 3, 1952, and relates to the 1952 affidavit. I don't think it is necessary to read that because it is the same except for the year.

Count Five is the same as Count Two except for the difference in the year. Count Five relates to the December 3, 1952, affidavit, and otherwise it is the same as Count Two which related to the 1951 affidavit. And, as I told you, Count Six has been dismissed.

Now, let me say again that the indictment is merely the statement of the offense charged. It is not evidence against the defendant. The defendant has entered a plea of not guilty to the charges contained in the indictment. The issues which you ladies and gentlemen are to determine are the guilt or the innocence of the defendant on each of the four counts remaining in the indictment.

The Federal statute which the defendant is charged with violating is Section 1001, Title 18, U.S.C. So far as it is pertinent to this case that statute reads: "Whoever in any [fol. 1225] matter within the jurisdiction of any department or agency of the United States knowingly and wilfully * * * makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement" shall be punished as provided by law.

For a violation of this statute to occur, there must be:

1. A matter within the jurisdiction of a department or agency of the United States.

2. The knowing and wilful making and using.

3. Of a false, fictitious or fraudulent material statement.

4. With knowledge that such statement was false, fictitious or fraudulent.

There are those four essential elements.

In this case the Government charges that there are two documents each containing two false statements. These documents are an Affidavit of a Non-Communist Union Officer executed by the defendant in 1951 and a similar document executed by the defendant in 1952.

The Labor Management Relations Act of 1947, and that is sometimes called the Taft-Hartley Act, provides that before a labor union can have certain rights under that law each officer of that union must execute and file with the National Labor Relations Board an affidavit "that he is not a member of the Communist Party or affiliated with such party." The law does not compel the filing of such an affidavit. Thus there is nothing wrong or illegal in not complying with the Taft-Hartley Act in this respect. The law merely provides that the National Labor Relations Board shall not take certain actions relating to labor unions unless certain things are done by the labor union requesting such action. One of those things that the Union has to do to obtain such action is the filing of these so-called non-Communist affidavits by the officers of the Union.

In this case counsel have stipulated—that is just a legal term for "agreed"—that the defendant Travis executed the [fol. 1226] affidavits for each of the years in question. They have stipulated that he mailed the affidavits, or caused them to be mailed to the National Labor Relations Board in Washington, that they were received by that Board, and that the Board acted upon them.

I have ruled as a matter of law that this is a matter within the jurisdiction of a department or agency of the United States.

To return now to the four elements which must exist to constitute a violation of the statute, that is, Section 1001 to which I have referred, it is clear that this is a matter within the jurisdiction of a department or agency of the United States and that the defendant made and used the

affidavits knowingly and wilfully, that is, that the defendant filed or caused to be filed the affidavits with the Board knowingly and wilfully. It remains for you, ladies and gentlemen, to determine whether: 1. The affidavits contained a false, fictitious or fraudulent material statement, and, 2. The defendant made and used the affidavits with the knowledge that they contained a material statement that was false, fictitious or fraudulent.

The United States charges in Counts 1 and 4 that the false statement was that he, Maurice E. Travis, was not then, that is on December 19, 1951, as to Count 1 and on December 3, 1952, as to Count 4, a member of the Communist Party, whereas he was then and there a member of that party.

As to Counts 2 and 5 the charge is that the false statement was that he, Maurice E. Travis, was not on the respective dates, that is, December 19, 1951, as to Count 2, and December 3, 1952, as to Count 5, affiliated with the Communist Party whereas he was then and there affiliated with that Party.

In order for you to return a verdict of guilty as to Count 1 you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 19, 1951, affidavit when he said that he was not then and there a member of the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of the matters, you should find the defendant not guilty on this count.

[fol. 1227] In order for you to return a verdict of guilty as to Count 2, you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 19, 1951, affidavit when he said that he was not then and there affiliated with the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of these matters, you should find the defendant not guilty on this count.

In order for you to return a verdict of guilty as to Count 4, you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 3, 1952, affidavit when he said he was not then and there a member of the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of these matters, you should find the defendant not guilty on this count.

For you to return a verdict of guilty as to Count 5 you must find from the evidence beyond a reasonable doubt that the defendant made a false material statement in the December 3, 1952, affidavit when he said that he was not then and there affiliated with the Communist Party and that he made such statement knowing it to be false. On the other hand, if you find that the United States has failed to satisfy you beyond a reasonable doubt as to either or both of these matters, then you should find the defendant not guilty on this count.

The acts charged in the indictment are alleged to have been done "knowingly" and "wilfully". The word "knowingly" means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word "wilfully" means to act voluntarily and purposely and with the intent to do that which the law forbids.

The crucial issue of fact in this case is whether on December 19, 1951, and December 3, 1952, Maurice E. Travis was or was not then a member of the Communist Party or affiliated with such party.

The affidavits do not call upon any person to state whether [fol. 1228] or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past either a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavits would be entitled to sign the affidavits under oath without violating the law.

Since the affidavits speak in the present tense only, the fundamental issue of fact for you to decide is whether or not at the times alleged in the indictment the defendant

knowingly and wilfully used an affidavit which was false and which he knew to be false at that time.

Whether or not the defendant was a member of the Communist Party at the times alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the times alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

[fol. 1229] In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with

officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; 5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization.

These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts it is your duty to consider all the evidence either direct or circumstantial which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.

In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt, that the defendant was a member of the Communist Party on December 19, 1951, and December 3, 1952, as alleged in the indictment, and [fol. 1230] if you find also that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first and fourth counts of the indictment, as I have outlined them to you, then you must

find the defendant guilty as to the first and fourth counts.

If, however, you find that the Government has not sustained the burden of proving beyond a reasonable doubt that the defendant was a member of the Communist Party on the dates alleged in the indictment, then you must find him not guilty as to the first and fourth counts.

"Affiliation" as used in the in the (sic) second and fifth counts of the indictment is not the same as membership. The word "affiliated", as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

A person may be found to be "affiliated" with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"Affiliation" includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

The defendant may not be convicted on any other charges than those contained in the indictment. There is some evidence in the case that the officers of the International Union of Mine-Mill and Smelter Workers executed non-Communist [fol. 1231] affidavits in 1949 and that the defendant Travis was then an officer of the Union. This evidence is pertinent only for the purpose of enabling you to determine the state of the defendant's mind, his intent, and whether he signed, made and used the 1951 and 1952 affidavits knowingly and wilfully with knowledge of their falsity. You are not war-

ranted in finding the defendant guilty in this case simply because you find from the evidence that he may have committed an offense not charged in the indictment, that is, an offense with respect to his 1949 affidavit.

You have heard the testimony of a witness who has given evidence and testified as an expert, giving an opinion. This class of testimony is proper and competent on matters involving special knowledge or skill, or experience upon certain subjects which are not within the realm of the ordinary experience of mankind and which require special research and study to understand. The law allows those skilled in such special fields to express their opinions and, upon a hypothetical set of facts stated to them, to say whether or not, according to their experience and research, a fact may or may not exist. While an expert is allowed to state his opinions, it is entirely within the province of you, ladies and gentlemen of the Jury, to say what weight shall be given to it. You jurors are bound by the testimony of such a witness just as far as his testimony appeals to your wisdom, convincing you of its truth. The mere fact that witness was called as an expert and gave his opinion upon a particular point does not necessarily obligate you to accept his opinion as to what the facts are in the face of testimony of witnesses claiming to have actual knowledge of the facts.

The defendant has offered evidence in this case as to his good character for truth and veracity. In this connection, the law is that the defendant is entitled to put in issue his good character. The good character of the defendant is evidence and a circumstance which you should take into consideration, together with all the other facts and circumstances in determining the guilt or innocence of the defendant on the offense charged.

While testimony of good character is not a defense to a crime, such character testimony may alone create a reasonable doubt although without it the other evidence would be convincing. That is for you to determine. If you find from the evidence in this case, beyond a reasonable doubt, that [fol. 1232] the defendant did commit the offense as charged in the indictment, it will be your duty to convict him, notwithstanding his good character.

The only person who is on trial in this case is the defendant, Maurice E. Travis. The International Union of Mine, Mill and Smelter Workers is not on trial. Many references during the trial have been made to this Union. This testimony is only pertinent and admitted for your consideration as it has borne on the issues here regarding the truth or falsity of the charge in this case against the defendant Travis. The only issues for you to determine are the guilt or innocence of the defendant Travis on each of the four counts in the indictment.

You may not presume the existence of a fact and then infer from such presumed fact the existence of any other fact or circumstance. You may not infer from any presumed fact or facts that the defendant is guilty of any of the offenses charged in the indictment.

In every crime there has to be a joint operation to act and intent. The burden is on the Government to prove both act and intent beyond a reasonable doubt.

With respect to offenses such as charged in this case, proof of specific intent is required before there can be a conviction. Specific intent, as the term suggests, means more than a mere general intent to commit an act.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does, there can be no eyewitness account of the state of mind with which the act was done. What a defendant does may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent the Jury is entitled to consider any statements made and acts done by the defendant, and all facts and circumstances in evidence which may aid in the determination of state of mind.

A person is held to intend all the natural and probable consequences of acts knowingly done. The law assumes a [fol. 1233] person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done.

As you have observed the defendant did not take the witness stand. That fact must not prejudice you against him.

The statutes of the United States provide in Section 3481 of Title 18, United States Code, that: "In the trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts-martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request be a competent witness. His failure to make such request shall not create any presumption against him." You must, therefore, determine the guilt or innocence of the defendant on the basis of the evidence received in the case and not by what has not been given in evidence. As the statute says, the failure of a defendant in a criminal case to testify creates no presumption against him. You must not permit the fact that the defendant has not testified to weigh in any degree against him. That fact should not enter into the discussions or deliberations of the Jury in any manner.

Statements and arguments of counsel, as I have said several times in this case, are not evidence unless made as an admission or a stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, as they have in this case, the Jury must accept the stipulation as evidence and regard that fact as conclusively proved.

If the Court has done or said anything that has caused you to believe that you know how the Court feels this case should be decided, you should entirely disregard such opinion in arriving at your verdict. The law is that you should not be guided in your consideration of the case by what you may think the Court feels about the guilt or innocence of the defendant.

Your judgment must be your own, uninfluenced by the Court except that you are bound to follow the law of the case as the Court gives it to you in these instructions. As I have told you, the Court is the judge of the law. It is your duty to accept the Court's decision as to the law. On the other hand, you are the sole judges of the facts. You shall [fol. 1234] act independently, using your own common sense and judgment, and performing your duty under your oaths in deciding the facts wholly independent of any influence of the Court.

In determining the facts you should consider only the evidence given upon the trial. Evidence offered at the trial

and rejected by the Court and evidence stricken from the record by order of the Court must not be considered by you.

I again repeat that you will consider these instructions in their entirety and as a whole. You should not separate any portion of them from the whole and depend upon that or any other portion.

In order for you to reach a verdict all 12 of you must agree upon the verdict. When you retire you will first select a foreman. The verdicts which you agree upon will be signed by the foreman and then you will return them here in court. You may take the indictment with you into the jury room, but I again remind you that Counts 3 and 6 have been dismissed and I again instruct you that the indictment is not evidence against the defendant and should not be so considered. It is merely the formal charge.

If you care to examine any of the exhibits which have been received in evidence, let your wishes be known to the bailiff who will have you in charge, and he will obtain the exhibit or exhibits from the Clerk.

In this regard there is one other matter I wish to mention. Counsel during the trial have referred to the transcript of the evidence which has been prepared from day to day by the reporter. The law is that I cannot permit you to have that transcript in the jury room. In cases where there is a daily transcript it is quite common to have a request from the Jury for a copy of the transcript, but under the law which binds me I cannot let you have that. Also, under the practice in this jurisdiction, the instructions are oral and you cannot have a copy of the instructions.

Forms of verdict have been prepared for your convenience. As to each of the four counts there are two forms. One form will be signed by your foreman as to each count if you find the defendant guilty; the other form as to each [fol. 1235] count if you find the defendant not guilty. The forms are very simple and I believe you will have no difficulty in understanding them. Please remember that you must return a verdict on each of the four counts.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff, but bear in mind this, please, that you are not to reveal to the Court or to any person how the jury stands numerically

or otherwise on the guilt or innocence of the defendant on any of the four counts until after you have reached a unanimous verdict and returned it into Court.

Those, ladies and gentlemen, are the instructions as to the law the Court proposes to give you. I wish at this time that counsel would come to the Bench.

(Conference at the bench.)

In Chambers

The Court: At this time counsel can make, either side may make any additional objections which have not already been noted to any of the Court's instructions.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Witt: If the Court please, I was more anxious to come in and say a word about a motion for mistrial made during the course of Mr. Kelley's summation than to make further objections so the record will be clear. You recall I made a motion for mistrial when Mr. Kelley was referring to Eckert's testimony about Willard Morris, and Mr. Kelley said at that point that Willard Morris was the right-wing counsel for the union then. This was you recall, your Honor, in connection with the Steering Committee meeting related to the February, 1946, Board meeting.

In saying that Mr. Kelley wasn't being accurate as far as the testimony goes. I have since checked it to make sure. The transcript which I do not have here will show that Eckert was asked whether Willard Morris was a member of the Communist Party, and his answer was no. So, there is no reference in the testimony that Willard Morris was the right-wing counsel, just the testimony that he wasn't a member of the Communist Party. This is not being hyper- [fol. 1236] technical, if the Court please, or hypersensitive, but in view of the matters contained in our motions for mistrial in connection with the testimony of the witness Eckert based on the changes in his testimony, in light of discussions with the prosecution which we considered improper we think Mr. Kelley should have been supremely careful in staying away from this problem on summation, and added to those other matters in connection with the

testimony of the witness Eckert we think this reference of Mr. Kelley, a wrong reference to the testimony of Eckert justifies a mistrial.

Just one final word, your Honor,—I hate to keep you longer because of the situation with the jury—it seems to me, maybe I am hypersensitive, but the names and incidents or meetings and all the rest of it that Eckert testified to on direct Mr. Kelley has selected only a few illustrations in his summation to the jury and Eckert's testimony about Willard Morris is one of the most minor in the whole length and scope of the testimony, so, it is particularly unfortunate that Mr. Kelley injected the reference to a person who was in '46 according to the way Mr. Kelley put it right-wing counsel.

The Court: Well, I see no basis from what you have just stated that would warrant a reconsideration of my action in the courtroom in denying the motion for a mistrial, but I will deny this motion also for a mistrial. Now, if you have any additional objections to the instructions, why, I wish you would state them for the record. The ones you have already stated, of course, are already in the record, and your record is preserved on them, and I think you should try to limit it to any additional objections.

Mr. Witt: We understand. Will you give us a moment?

The Court: All right.

OBJECTIONS TO INSTRUCTIONS

Mr. Witt: This, again, is out of an abundance of caution. I am quite sure the record yesterday shows that your Honor stated that he would quote only the same part of Section 1001 that Judge Breitenstein stated.

The Court: It was this morning. It is in the record this morning.

Mr. Witt: I think the record shows our objection. If not, [fol. 1237] we make it now. I am not sure, again, it is because I am tired, your Honor, so you will forgive me if I am repeating myself, I am not sure that yesterday in objecting to the proposed instruction on affiliation as requested by the Government and as indicated by your Honor you would give we made specific objections among other things to the last paragraph of each of those instructions. If we didn't yesterday, may we do so now? That is the paragraph

referring to the fact that the juror may take into consideration all other evidence, et cetera, et cetera. Our point on that, whatever validity the instructions have otherwise is destroyed by the scope and breadth and looseness of those final paragraphs in the two respective instructions.

The Court: I omitted and there wasn't given in the instructions the last paragraph on the Government's tendered instruction.

Mr. Kelley: He means on the membership one.

Mr. Witt: And the affiliation.

Mr. Kelley: And affiliation. After you list the indicia then you state in effect that the jury is not limited to those but can consider all others.

The Court: That is also with respect to the membership.

Mr. Witt: The record will show. If I am wrong, the record will show.

The Court: I want the record to be sure, because there is no record of the tendered instruction until I dictated it in. I omitted the last paragraph of the tendered instruction in which I thought I discussed yesterday in detail it might have constituted an invitation to the jury to consider these membership indicia as being applicable to the affiliation.

Mr. Witt: If there is any doubt in your mind, it won't take too long for Miss Marson to find it.

The Court: Your objection is clear. I mentioned that so the record will be clear. Are there any other objections? [fol. 1238] Mr. Witt: Again, these two things are out of an excessive abundance of caution, but I am sorry, that is the way I feel, I think we objected to the paragraph when we discussed it yesterday relating to testimony by experts. We want the record to show that we object to that again. Then I think we objected yesterday to your Honor's reference or proposed reference to some informers in the paragraph relating to the weighing of the informer testimony and the fact that this record shows there was only one informer which just confuses and bewilders the jury it seems to us, and, if Mr. Kelley was right in his summation and it had any effect on the jury that informers are patriots or something along those lines—he didn't use that word—the effect of your Honor's instruction referring to some informers when there was only one is merely to heighten the

effect of Mr. Kelley's reference to that in his summation if it took any effect.

The Court: I think that objection was made yesterday and overruled, and it will be overruled now. Are there any further objections?

Mr. Kelley: The Government has no objections.

The Court: Let's go in now and discharge this 13th juror I guess is the next step in the thing.

In Chambers

The Court: You may proceed.

Mr. Deikman: On page 1870 of the transcript reads, line 6, "The affidavit as to membership and Count 3 relates to—" at that point I am quite sure I said Count 2 rather than Count 3.

The Court: I see no objection. Count 3 is the one that has been dismissed.

Mr. Deikman: I was referring to the count that relates to falsity of the affidavit as to—

The Court: You want to change "3" to "2". I am going to change this original with a pen. One thing I just thought of, I think you had better take all exhibits up to the jury if [fol. 1239] there is no objection rather than for them to send down.

Mr. Kelley: It has happened already.

The Court: They have all of them?

Mr. Kelley: All that were admitted.

The Court: That is the way it had better be, because otherwise the Clerk would have them, and the Clerk may be gone or something, and we might as well send the whole works up. The Marshal was inquiring, and I didn't know whether he wanted them all or part of them.

Mr. Kelley: They were all turned over to them. Mr. Deikman and Government counsel checked them and with the Clerk, and I am sure we got the right ones.

In Open Court

The Court: Ladies and gentlemen of the Jury, have you reached your verdicts in this case?

The Foreman: We have, your Honor.

The Court: You may hand the verdicts to the Bailiff and he will transmit them to me. Ladies and gentlemen of the Jury, you will listen to the reading of your verdicts: "In the United States District Court for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal No. 14266. Verdict. We, the Jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis guilty as charged in Count 1 of the indictment herein." Signed Otto Gardner, Foreman.

The second verdict is as follows: "In the United States District Court for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal 14266. Verdict. We, the jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis guilty as charged in Count 2 of the indictment herein," and it is signed by Mr. Gardner, Foreman.

The third verdict: "In the United States District Court [fol. 1240] for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal 14266. Verdict. We, the Jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis, guilty as charged in Count 4 of the indictment herein." Signed, Otto Gardner, Foreman.

The last verdict: "In the United States District Court for the District of Colorado, the United States of America, Plaintiff, vs. Maurice E. Travis, Defendant, Criminal 14266. Verdict. We, the Jury, in the above-entitled case upon our oath do say we find the defendant, Maurice E. Travis, guilty as charged in Count 5 of the indictment herein." Signed Otto Gardner, Foreman.

Ladies and gentlemen of the Jury, are these and were these your verdicts in this case? (assent) Do you desire that the jury be individually polled?

Mr. Witt: We do.

The Court: As to all counts?

Mr. Witt: Yes, sir, as to all counts.

(Jury polled as to Count 1:)

Mr. Witt: Were all the jurors polled?

The Clerk: Yes, sir.

Mr. Witt: We waive the poll of the jurors as to the other three counts.

The Court: All right, then, the verdicts will be received and recorded, and the matter will be referred for a presentence report. I gather—is there any objection on the part of the United States for the defendant to remain at liberty on the present bail until the case is disposed of?

Mr. Kelley: No, your Honor, and at this time we would like to move for judgment on the verdicts.

The Court: The verdicts will be recorded, and, of course, [fol. 1241] the judgment will not be until sentencing, but there is no objection to his remaining at liberty on his present bail bond?

Mr. Kelley: Right.

The Court: And the matter will be referred for a presentence report.

Mr. Witt: Pursuant to the discussion in chambers we will file our appropriate motions under the rules.

The Court: Very well. You will have that right to do that.

Mr. Deikman: May I have a conference with Mr. Witt before the jury is discharged?

The Court: Yes.

OBJECTIONS TO VERDICTS AND COURT'S RULING

Mr. Deikman: Your Honor, at this time the defendant objects to the verdicts on the grounds that they are null and void and have no legal effect whatsoever and no valid judgment can be based upon them in so far as the verdicts do not inform the defendant as to whether he is in the minds of the jury guilty of membership, falsity of the affidavit in regard to membership or falsity of the affidavit as to affiliation as to each of the two years in question in the indictment, and for that reason because the verdict of the jury is inconsistent and the findings as to affiliation and membership repugnant to one another the defendant is not informed of what he has been found guilty, and, therefore, the verdicts are invalid.

The Court: The motion will be denied.

Filed March 17, 1958.

[fol. 1242] PLAINTIFF'S EXHIBIT 1.

Form NLRB-1081
(6-49)

United States Of America
National Labor Relations Board
Affidavit Of Noncommunist Union Officer

(See instructions on reverse)

The undersigned, being duly sworn, deposes and says:

1. I am a responsible officer of the union named below.

2. I am not a member of the Communist Party or affiliated with such party.

International Union of Mine, Mill & Smelter Workers
(Full name of union, including local name and number)

.....

(Full name of national or international union of which it is an affiliate or constituent unit)

Signature M. E. Travis
Address 412 Tabor Building
Denver, Colorado

(The notary public or other person authorized by law to administer oaths must fill in completely all blank spaces below.)

Subscribed and sworn to before me this 19th day of December 1951 A notary public or other person authorized by law to administer oaths and take acknowledgements in and for the county of Denver, State of Colorado My commission expires March 23, 1955

(Seal)

Fuchsia L. Mitchell
(Signature)

[Reverse]

Instructions For The Use Of This Form

Who Must File.—This affidavit must be filed by each officer of a labor organization before that organization may receive the help of the National Labor Relations Board. [fol. 1243] An affidavit must be on file for each officer listed in your constitution and by-laws.

Where To File.—National And International Labor Organizations must file this affidavit with the Affidavit Compliance Branch, National Labor Relations Board, Washington 25, D.C.

Local Labor Organizations must file this affidavit with the Regional Office of the National Labor Relations Board with which they usually file cases.

When To File.—This affidavit is good for only one year from the time it is signed and must be renewed each year. Each time a new officer is elected or appointed, he must file this affidavit. If an officer is reelected, it is not necessary to file a new affidavit unless the affidavit on file with the National Labor Relations Board is more than one year old.

How To Prepare This Affidavit:

a. Read carefully items 1, 2 and 3 of this affidavit.

b. Fill in the full name of your labor organization, including the local name and number.

If your organization is affiliated with a national or international organization, give the full name of the national or international.

(Example)

Plastic, Button and Novelty Workers Union, Local 506

International Ladies Garment Workers Union—AFL

c. The officer must sign his name in the presence of a notary or other person authorized by law to administer oaths.

d. The officer must give his full home address; be sure to give the street address, city and State.

[fol. 1244] PLAINTIFF'S EXHIBIT 2.

International Union Of Mine, Mill And Smelter Workers

Founded In 1893

Suite 412—Tabor Building 16th and Curtis Denver 2, Colorado Keystone 7211

December 21, 1951

Mr. Claude B. Calkin, Affidavit Compliance Officer, National Labor Relations Board, Washington 25, D.C.

Dear Sir: In connection with the filing requirements of the Labor-Management Relations Act, 1947, we enclose NLRB Form 1080, Certificate of Union Officers, and Forms NLRB 1081, the notarized affidavits of our officers and executive board members.

Very truly yours,

John Clark
President

jc/v
enc
Air Mail
Registered
Return Receipt

PLAINTIFF'S EXHIBIT 3.

January 8, 1952

Mr. John Clark, President, International Union of Mine, Mill and Smelter Workers, Suite 412, Tabor Building, 16th and Curtis, Denver 2, Colorado.

Dear Mr. Clark: This will acknowledge receipt of your letter of December 21, 1951, enclosing compliance material submitted in accordance with the filing requirements of Section 9 (f), (g) and (h) of the Labor Management Relations Act, 1947.

The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of

the Act until June 30, 1952, and under Section 9 (h) until December 7, 1952, provided there are no intervening changes in your officers.

[fol. 1245] Our Regional and Sub-Regional offices have been notified of your renewal of compliance.

This, of course, does not cover your local organizations. Each local must separately meet the above filing requirements of the Act in order to enjoy its benefits.

We will give you thirty days advance notice, whenever possible, of pending expiration of compliance as reflected by our records. We assume no responsibility for notification as it is your obligation to keep this material up to date.

Very truly yours,

Claude B. Calkin,
Affidavit Compliance Officer

PLAINTIFF'S EXHIBIT 4.

Form NLRB-1081
(6-51) United States Of America
National Labor Relations Board
Affidavit Of Noncommunist Union Officer

(See instructions on reverse)

The undersigned, being duly sworn, deposes and says:

1. I am a responsible officer of the union named below.

2. I am not a member of the Communist Party or affiliated with such party.

.....

(Full name of union, including local name and number)

International Union Of Mine, Mill And Smelter Workers
(Full name of national or international union of which it is an affiliate or constituent unit)

Signature M. E. Travis

Residence 3456 Decatur Street
Denver, Colorado

(The notary public or other person authorized by law to administer oaths must fill in completely all blank spaces below.)

[fol. 1246] Subscribed and sworn to before me this 3rd day of December 1952 A notary public or other person authorized by law to administer oaths and take acknowledgements in and for the county of Denver, State of Colorado My commission expires November 9, 1955

(Seal)

Myrtle L. Tully
(Signature)
Notary Public

[Instructions on reverse side identical with those appearing on reverse side of plaintiff's exhibit 1.]

PLAINTIFF'S EXHIBIT 5.

International Union Of Mine, Mill And Smelter Workers

Founded In 1893

Suite 412—Tabor Building 16th and Curtis Denver 2, Colorado Keystone 7211

December 3, 1952

National Labor Relations Board, Washington 25, D.C.

Gentlemen: In accordance with the provisions of the Labor-Management Relations Act, 1947, we enclose herewith Form NLRB 1080, Certificate of Union Officers and Affidavits of Non-Communist Union Officer signed by the officers of our organization.

Very truly yours,

John Clark
President

jc/v
encs

PLAINTIFF'S EXHIBIT 6.

December 8, 1952

Mr. John Clark, President, International Union of Mine, Mill and Smelter Workers, Suite 412, Tabor Building, 16th and Curtis Denver 2, Colorado

Dear Mr. Clark: This will acknowledge receipt of your [fol. 1247] letter of December 3, 1952, enclosing material submitted in accordance with the filing requirements of Section 9 (f), (g), and (h) of the Labor Management Relations Act, 1947.

The National Labor Relations Board will consider your organization in compliance with Section 9 (f) and (g) of the Act until June 30, 1953, and under Section 9 (h) until November 18, 1953, provided there are no intervening changes in your officers.

Our Regional and Sub-Regional offices have been notified of your compliance.

This, of course, does not cover your local organizations. Each local must separately meet the above filing requirements of the Act in order to enjoy its benefits.

We will give you thirty days advance notice, whenever possible, of pending expiration of compliance as reflected by our records. We assume no responsibility for notification as it is your obligation to keep this material up to date.

Very truly yours,

Robert Frazer
Affidavit Compliance Officer

Govt exhibit 8
DEC 6 1955
Crim 14266

TRAVIS STATEMENT ON SIGNING TAFT-HARTLEY LAW AFFIDAVIT

By Maurice Travis
Int'l Secretary-Treasurer

The Executive Board of our International Union has voted to comply with the Taft-Hartley Law. I support this decision.

As most of the membership knows, I have stated, more than once in the last two years, that if it became important to the life of our union to comply with Taft-Hartley, I would support such a step. The reasons which have now made it vital to our Union to comply, are the betrayal of labor's fight for repeal of the Taft-Hartley Act by the controlling leadership of both the CIO and the AFL, by the 81st Congress and the Truman Administration — a betrayal which now saddles the labor movement with this law for another two years—and as part of that betrayal, the adoption of raiding, gangsterism and strikebreaking as official policy by reactionaries in the leadership of CIO.

Since the Executive Board meeting at which compliance was voted, I have deliberated very carefully on my course and I have also had the benefit of thorough discussions with my fellow officers, Executive Board members and members of the Staff. The unanimous opinion of my fellow officers and the others in the International Union is that the most effective way in which I can serve the International Union is by continuing in my post as an officer of the International Union.

☆ ☆ ☆

SINCE THE INTEREST of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and, as a result, I have signed the affidavit.

This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist; it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests.

The very premise of the Taft Hartley affidavits is a big lie the same sort of lie that made the peoples of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists.

☆ ☆ ☆

THE BIGGEST LIE of all is to say that the Communist Party teaches or advocates the overthrow of the government by force and violence. If I had believed this to be so I would not have joined the Communist Party. If I had later found it to be so I would never have remained in it. All the slanders by the corrupt press, all the FBI stool pigeons, and all the persecution of Communist workers will not make me believe it is so. I believe that when the majority of the American people see clearly how rotten the foundation of the capitalist system is, they will insist on their right to change it through democratic processes, and all of the reactionary force and violence in the world will be unable to stop them.

It is because I believe these things that I have fought the affidavit requirement of Taft-Hartley. I believe it is a blot on American life; I believe under our Bill of Rights, for which our forefathers fought, that an American has as much right to be a Communist as he has to be a Republican, a Democrat, a Jew, a Catholic, or an Elk or a Mason. Free voluntary association is the very cornerstone of the democratic way of life. I have been a Communist because I want what all decent Americans want, a higher standard of living for all the people, the ending of discrimination against Negroes, Mexican-Americans, and all other minority groups. I want a peaceful America in a peaceful world. Despite my resignation from the Communist Party, I will continue to fight for these goals with all the energy and sincerity at my command.

I am also taking this step because I believe it is one effective means of bringing home not only to the membership of the International Union but to the people generally, the dastardly and unprecedented requirement that a man yield up his political affiliations in order to make a government service available to the people he represents. This is a dangerously backward step in American political life which threatens all of our democratic institutions. Americans have the right to belong to the political party of their choice and trade union members have the right to choose their own leaders. Denial of these principles undermines democracy and gives comfort to the arrogant reactionaries who seek to put our country on the road to fascism.

☆ ☆ ☆

AT THE SAME TIME, I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, "Labor produces all wealth—wealth belongs to the producer thereof," can lead to the end of insecurity, discrimination, depressions and the danger of war.

I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror. I am convinced it is responsible for depression, unemployment and the mass misery they generate. The present deepening depression, growing unemployment, and threat of war confirm my conviction that the only answer is Socialism.

As a matter of fact, this Socialist concept has always been the guiding principle for American workers. The struggle led by the great Eugene V. Debs, the early fight for the 8-hour work day, the steel and packing struggles led by Bill Foster, the stormy history of the I.W.W. were all influenced by Socialist ideals.

As a member of our International Union I have always been proud of and have drawn strength from its basic Socialist tradition. No other union in this country matches ours in its glorious working-class history. Our union, and its predecessor, the Western Federation of Miners, has carried on some of the most bitter and courageous struggles in the history of the labor movement. I have always been inspired by the fact that early leaders of this union were socialistic in one form or another, that Bill Haywood also took the road to Communism and died not only as a great leader of the working class but as an honored and respected Communist.

Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union.

☆ ☆ ☆

I KNOW THAT SOONER or later we will turn this present shameful page in American life, that the reactionary offensive will be beaten back and that the American workers will again resume their march on the road to peace, progress and prosperity. Particularly do I know that the day will come when loyalty oaths and affidavits will be a thing of the past, when the true test will again be service to the people and, for trade union leaders, service to their members.

In the meantime, I am sure that every member of the International Union joins me in my pledge to fight to keep this International Union strong, to bend every effort to make it even stronger, to continue to keep it on a progressive, militant course, and to do everything in my power to make life in our country happy, secure, prosperous and peaceful.

It's Official Now

President John Clark announced last week that he had been officially notified in a letter from the National Labor Relations Board that Mine-Mill is in full compliance with the provisions of the Taft-Hartley Act and is now eligible to use the processes of the board.

The formal compliance notification followed the unanimous decision of Mine-Mill's International Executive Board to meet the signing requirements of the Taft-Hartley Act.

MAURICE TRAVIS

(Picture taken before Travis lost an eye in beating by Shipbuilder thugs at Bessemer, Ala.)

[fol. 1251] DEFENDANT'S EXHIBIT A

FBI Detroit 4/8/53

Director, FBI And SAC Alburquerque

Clinton Edward Jencks, Kenneth Eckert Advised That Jencks Attended Several CP Meetings Between August Twenty Fifth And Thirty, Forty Seven At Lowry Hotel, St. Paul, Minn. These CP Meetings Were In Connection With Convention Of IUMM&SW Held At That Time. Eckert Advised Several CP Meetings Were Called By The Top Steering Committee Of IUMM&SW Composed Of Maurice Travis, Chase Powers, L. Skinner And Eckert, All CP Members. Eckert Does Not Recall Exact Number Of Meetings Attended By Jencks But These Meetings Were Called To Plan CP Activity At Convention. Eckert Fairly Certain That Jencks Attended CP Meetings After This At Various Cities Throughout The U.S. But Stated He Would Be Unable To Testify As To Places Or Dates Of Subsequent Meetings. Eckert Explained That Jencks Was In A Lower Echelon Than Eckert And Thus They Were Not In Contact Often. Subpoena Should Be Addressed To Eckerts Home, Two Two Five Three Two Alexander Lane, St. Clair Shores, Mich.

DEFENDANT'S EXHIBIT B

SAC, Seattle January 5, 1956
SAC, Detroit
Charles Joseph Powers.

Kenneth Eckert, Representative of the Die Casting Workers, UAW-AFL-CIO, 408 Notre Dame, Grosse Pointe, Michigan, was interviewed by SA Emil J. Rothfuss and SA J. F. Sullivan on December 28, 1955. Eckert, a self-admitted member of the Communist Party (CP), 1932-1948, has testified in behalf of the United States Government in various trials and hearings.

Eckert, a former union official of the Mine, Mill and Smelter Workers, advised that he, (Eckert), and Chase Powers were among the members of the CP Steering Committee in the Mine, Mill and Smelter Workers, 1946-1948, at which time he, Eckert, broke with the CP.

According to Eckert, the CP Steering Committee meet-
[fol. 1252] ings were held before the meetings of the International Executive Board of the Mine, Mill and Smelter Workers, at which time Mine-Mill Policy, Party decisions and major decisions were discussed. During that period Chase Powers was a member of the Executive Board of the Mine, Mill and Smelter Workers.

EJR:dmc

Eckert stated that he knew Chase Powers as a CP member from approximately 1945, to 1948; however, he had never seen Powers' CP card since both belonged to different branches of the CP.

Eckert advised that he would not furnish a signed statement and would not testify to the information set forth above. He stated that the time factor involved in testifying would not enable him to carry on his current union responsibilities. In addition, Eckert indicated that in testifying in matters of this type, it placed him in a very damaging position within his union.

DEFENDANT'S EXHIBIT L

(Page 5.)

In regard to the Wallace-Kellogg, Idaho, area, Gardner stopped in Denver, Colorado to confer with Harold Sanderson, and IUMM&SW Official, and Maurice Travis, then International Secretary and Treasurer of IUMM&SW. Sanderson then informed Gardner of a delicate factional dispute both within the CP and IUMM&SW in the Idaho area. Sanderson told Gardner that Rudy Hanson, a former IUMM&SW Organizer and a CP member, would be expelled from the CP for activities detrimental to the Party and to IUMM&SW. Sanderson told Gardner how Hanson was undermining Chase Powers in the hope that Hanson would replace Powers as a Board Member of IUMM&SW. Sanderson told Gardner not to attempt to make any Party contacts and that if the Party thought it necessary they would contact Gardner.

[fol. 1253] DEFENDANT'S EXHIBIT R

SAC Wyly
SA Zoeller

August 10, 1953

William Mason orally advised on August 7, 1953, that his fight with the Travis machine in Mine-Mill was apparently breaking into the open. He stated that Travis had settled the Union's dispute with A.S. and R. for 8½ cents per hour and had also, without checking with the other sections of the Union, extended the contract to 1956.

Informant said that Travis, feeling quite pleased with himself over this, had erroneously interpreted a proposal made to the Anaconda Copper Mining Company as amounting to only 6 cents an hour and had severely criticized the Executive Board members for District No. 1 and the Montana locals. Informant said that in fact the proposal to the A.C.M. Company was much greater than 8½ cents per hour.

As a result, the Montana members were very upset with the international officers and were demanding to know what was going on. Travis realizing his error flew in from Denver and had a conference with William Mason and John Clark. Travis urged that there be no inter-union split and that the Union should present a united front to the various companies.

William Mason really told Travis off including charges of Communism on the part of Travis.

Travis, calling a meeting of the Union's Wage Policy Committee in Denver for August 10, 1953, urged William Mason to come early to the meeting to meet with him, noting that they could settle their differences. To counter this move on the part of Travis, Mason has called a meeting of the Anaconda Wage Council for Denver on the same date. Informant said that the open fight is becoming greater every day and this is the beginning of a definite anti-Travis move, at least on the part of the Montana locals.

Informant stated that he would contact the writer upon his return from Denver.

[fol. 1254] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1255]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Pleas and proceedings before The Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

UNITED STATES OF AMERICA, Plaintiff,

vs.

MAURICE E. TRAVIS, Defendant.

No. 14,266, Criminal.

SUPPLEMENTAL TRANSCRIPT OF RECORD

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. A.

You are instructed that the defendant's admitted membership in the Communist Party before August, 1949 did not constitute a bar to his truthful signing of the affidavits in 1951 and 1952 if in fact he terminated his membership at or before the time that he had signed the affidavits. Past members of the Communist Party may truthfully sign the affidavit if they first terminate their membership. And it does not matter whether the termination takes place years before or a day before the affidavit is signed so long as there is in fact a termination. I direct your attention to the fact that the affidavit is in the present tense and the defendant was not called upon to make, and did not make any representation in his two affidavits concerning his past membership. Such past membership is in no sense inconsistent with the truth of his affidavits. On the contrary, the law contemplates that past members of the Communist Party may terminate their membership therein and thereupon become eligible truthfully to sign the affidavit.

The admitted fact that the defendant had been a member of the Communist Party, no matter how active or important, until August, 1949, cannot support a finding that [fol. 1256] the affidavits he signed in December, 1951 and December, 1952 were not truthful. There is no presumption of continued membership in the face of the signing of the affidavits and it is necessary for the Government, in order to support its burden of proof, to show beyond a reasonable doubt that the defendant was a member of the Communist Party as defined above at the time that he signed the affidavits in December, 1951 and December, 1952. No inference of continued membership can be drawn by you on the basis of past membership in the face of his having signed the affidavits, since such an inference would be inconsistent with the presumption of innocence.

The witness, Kenneth Eckert, testified that a member of the Communist Party could not leave the Party, that he got out only by expulsion. Unless from other evidence in the case, you are convinced beyond a reasonable doubt that there was such a rule or policy in August, 1949, and that the defendant knew of the rule or policy at that time and had himself agreed with or accepted, or approved, or adopted it, this testimony of the witness, Kenneth Eckert, about such a rule or policy should not be considered by you as evidence against the defendant and should be disregarded and given no consideration by you in your deliberations.

The witness, Kenneth Eckert, also testified on direct examination that he was expelled by the Communist Party in 1948. However, since it was brought out on cross examination of Eckert that his testimony that he was expelled was based on what he read in leaflets and in a newspaper, and since there is no evidence that the defendant had anything to do with the termination of Eckert's membership in the Communist Party, or that the defendant ever knew of the termination, or that the defendant ever knew of any rule or policy of the Communist Party with respect to how membership could be terminated, or that the defendant agreed with or accepted, or approved, or adopted any such policy, the testimony of the witness, Kenneth Eckert, about his expulsion should not be con-

sidered by you as evidence against the defendant and should be disregarded and given no consideration by you in your deliberations.

However, even if you find that the defendant's resignation from the Communist Party in August, 1949 was not in fact a true resignation, either because of the rule or policy about which Eckert testified or because of some [fol. 1257] understanding about the matter between the defendant and the Communist Party, such a finding would not permit you to draw the inference that either his 1951 affidavit or his 1952 affidavit was false. As I have said, there is no inference or presumption that his membership in the Communist Party in August, 1949 continued until December, 1951 and December, 1952 in the face of his signing of the affidavits at those times. Such an inference or presumption would violate the presumption of innocence. As I have also told you, the prosecution must show membership beyond a reasonable doubt on and after December 19, 1951 on count one and on and after December 3, 1952 on count two.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. B.

Membership in the Communist Party is a formal relation between an individual and the Communist Party which is defined by the rules and regulations of the Communist Party.

The Communist Party, like other voluntary organizations, sets forth the conditions which a person must accept in order to become and remain a member. The burden is on the prosecution to prove beyond a reasonable doubt what the conditions were for membership in the Communist Party, whether found in its Constitution or elsewhere, on and after December 19, 1951, under the first count, and on and after December 3, 1952, under the fourth count, and that the defendant accepted those conditions on and after December 19, 1951, under the first count, and on and after December 3, 1952 under the fourth count. You must acquit the defendant as to either or both of these

counts, as the case may be, if these matters have not been proved beyond a reasonable doubt.

In addition, you must acquit the defendant as to either or both of these counts, as the case may be, unless the evidence proves beyond a reasonable doubt that on and after these two dates, he desired to belong to the Communist Party and that the Communist Party considered him a member.

In addition, for a person to be a member of the Communist Party, certain actions are usually required, such as paying dues, attending meetings, and doing the work [fol. 1258] of the Communist Party. You must acquit the defendant as to either or both of these counts, as the case may be, unless you are convinced beyond a reasonable doubt that the defendant engaged in such actions on and after these two dates.

Not every relation between an individual and an organization constitutes membership. An individual may be sympathetic, or agree with, all or part of the program of an organization, and cooperate actively with it and still not be a member.

Isolated acts of the defendant, showing cooperation with the Communist Party, or isolated statements of the defendant, showing sympathy with the Communist Party or with its aims or policies, are not evidence of membership.

If at the time of signing the affidavits, the defendant did not believe himself to be a member of the Communist Party, as I have defined membership, you must find him not guilty on either or both counts one and four, as the case may be.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION NO. C.

Affiliation, as used in counts two and five, is not the same as membership. It is something less than membership and something more than mere sympathy.

Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of con-

duct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.

Affiliation is more than a mere course of conduct. It is a factual and formal relationship.

Mere cooperation with an organization, or intermittent or repeated acts of support, do not establish affiliation. Mere cooperation or support do not constitute affiliation.

To constitute affiliation there must be a status of mutual recognition and dependability on the part of the organiza-
[fol. 1259] tion and the individual. If any of these elements is lacking, there is no affiliation.

Affiliation is a question of intent, and unless both the individual and the organization intended such a relationship to exist at a particular time, there is no affiliation with that organization.

Whether intermittent or repeated, the act or acts tending to prove affiliation and that both the defendant and the Communist Party intended such a relationship to exist on these dates, must be of that quality which indicates an adherence to or a furtherance of the illegal purposes or objectives of the ~~proscribed organization~~ Communist Party [Handwritten notation] as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the illegal program to fruition. Unless there is evidence which convinces you beyond a reasonable doubt of some illegal purpose or objective of the Communist Party on these dates and that the relationship between the defendant and the Communist Party on and after these dates was a relationship based on the illegal purpose or objective, you must acquit the defendant on either or both of these counts, as the case may be.

If at the time of signing the affidavits, the defendant did not believe himself to be affiliated with the Communist Party, as I have defined affiliation, you must find him not guilty on either or both counts two and five, as the case may be.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION NO. D.

The defendant requests the conventional instructions regarding the presumption of innocence, burden of proof and reasonable doubt, inferences to be drawn from the fact of indictment, but requests that the usual instruction about circumstantial evidence be omitted and that the jury be instructed that the so-called perjury rules of evidence are applicable to this case, as follows:

The prosecution must establish the alleged falsity of the [fol. 1260] statements made by the defendant on each of the four counts by the testimony of two independent witnesses or by one witness and corroborating circumstances. Unless this has been done on any count, you must find the defendant not guilty on that count.

You cannot find the defendant guilty on any count if the proof of falsity is merely circumstantial.

If the falsity of any statement is supported by the testimony of only one witness with evidence of corroborating circumstances, you must find the defendant not guilty unless the corroboration is by proof of independent and material facts and circumstances tending directly to corroborate the testimony of the witness for the prosecution; and such proof must be of a strong character and not merely corroboration in slight particulars. Furthermore, the testimony of the prosecution's witness must contradict in positive terms the statement of the defendant or you cannot find the defendant guilty.

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION NO. F.

The witness, William Mason, was an informant for the Federal Bureau of Investigation at all or some of the times that he had his conversations with the defendant during the years 1949 to 1953. In view of the fact that Mason was an informant for the Federal Bureau of Investigation, his testimony must be examined with greater scrutiny and care than the testimony of an ordinary wit-

ness for the purpose of determining whether his testimony was colored by his relationship with the Federal Bureau of Investigation.

R covered by general instruction
Pg. 5 [Handwritten notation]

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. K.

Unless you find beyond a reasonable doubt that the [fol. 1261] alleged false, fictitious and fraudulent statements and representations made by the defendant were material, you must acquit the defendant under these counts.

You are instructed as a matter of law that the word "material", as used in each of the four counts in the indictment, means that the International Union of Mine, Mill and Smelter Workers utilized the services of the National Labor Relations Board during the year for which each of the two affidavits was filed. To put it another way, it means that the International Union of Mine, Mill and Smelter Workers must have filed charges of unfair labor practices or participated in representation cases in each of the two years.

Unless you find from the evidence that the International Union of Mine, Mill and Smelter Workers did use the services of the National Labor Relations Board, in the way I have just said, during the year from December, 1951 to December, 1952, you must acquit the defendant on counts one and two.

Unless you find from the evidence that the International Union of Mine, Mill and Smelter Workers did use the services of the National Labor Relations Board, in the way I have just said, during the year from December, 1952 to December, 1953, you must acquit the defendant on counts four and five.

R—last 3 paragraphs do not state
the law [Handwritten notation]

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. L.

Membership in the Communist Party is a different status than affiliation with the Communist Party. Membership is one relationship to an organization, and affiliation is another. It is therefore impossible for a person, at one and the same time, to be both a member of the Communist Party and affiliated with it. I therefore instruct you that if you find the defendant guilty under either count one or two relating to his 1951 affidavit, you must acquit him on the other count, and if you find him guilty under either count four or five relating to the 1952 affidavit, you must [fol. 1262] acquit him on the other count.

R.—confusing and question to be considered after verdicts returned [Handwritten notation]

Refused 2/4/58 W.L.K. [Handwritten notation]

DEFENDANT'S REQUESTED INSTRUCTION No. M.

With respect to each of the four counts you must find beyond a reasonable doubt not only that the statement of the defendant was false, but that the defendant knew it to be false at the time he signed the affidavit.

In other words, even if you should find the defendant was in fact a member of the Communist Party or affiliated with it on or about December, 1951 and December, 1952, you must find him not guilty unless you also find that at those times he believed that he was a member of the Communist Party or affiliated with it.

The law is that a person's mental state can be tested only by the outward manifestations exhibited by his conduct. These are what the law regards as overt acts. In other words, in order for you to find the defendant guilty with respect to any of the counts in the indictment, you must find that the defendant performed such overt acts which constitute membership or affiliation to such an extent that it would justify you in concluding beyond a reasonable

doubt that the defendant knew at the time he signed the affidavits that the statements contained in them were false.

R.—properly covered by given ins.
Some not the law
[Handwritten notation]

[fol. 1266]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 17, 1958 (omitted in printing)

[fol. 1267]

IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5879—November 1958 Term

MAURICE E. TRAVIS, Appellant,

—v.—

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Nathan Witt of New York, New York, for Appellant.

Donald E. Kelley, United States Attorney and Paul C. Vincent, Attorney, Department of Justice (Phillip R. Monahan and Anthony A. Ambrosio, Attorneys, Department of Justice, were with them on the brief), for Appellee.

Before: Phillips, Murrah and Lewis, Circuit Judges.

LEWIS, Circuit Judge:

OPINION—August 3, 1959

[fol. 1268] This action is here on appeal for the second time. On the first appeal,[1] this court set aside a conviction

[1] Travis v. United States, 10 Cir., 247 F.2d 130.

under the false statement statute, 18 U.S.C.A. 1001,[2] and ordered a new trial because of prejudicial error committed when the prosecutor was allowed to improperly cross-examine appellant's character witnesses. The present appeal is from a second conviction after retrial of the case in the United States District Court for the District of Colorado. Reversal is sought upon a claim of insufficiency of the evidence to support the verdict and numerous assertions of prejudicial error committed during the trial. Appellant also challenges the constitutionality of 18 U.S.C.A. 3500 both as to its provisions and as construed and applied by the trial court.

The appellant, Maurice E. Travis, was convicted by a jury on four counts of an indictment charging him with falsely and fraudulently attesting that he was not an affiliate or member of the Communist Party in two "Affidavits of Non-Communist Union Officers" he executed as a national [fol. 1269] officer of the International Union of Mine, Mill and Smelter Workers.[3] The first affidavit was executed on December 19, 1951, and the other on December 3, 1952, and Mine-Mill filed them with the National Labor Relations Board in compliance with the provisions of Section 9(h) of the National Labor Relations Act as amended by the Labor Management Act of 1947 (29 U.S.C.A. 159(h).)[4]

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[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[3] Hereafter called Mine-Mill.

[4] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, * * * and no complaint shall be issued pursuant to a charge made by a labor organization * * * unless there is on file with the Board an affidavit executed * * * by each officer of such labor organization * * * that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. * * *"

Following conviction, appellant was fined $2,000 and sentenced to serve a four-year term of imprisonment on each of two counts of the indictment. No fine was imposed as to the remaining two counts, but he was sentenced to four-year prison terms on both to run concurrently with the terms imposed on the other counts. Thus, he was sentenced to a total of eight years in prison and fined $4,000.[5]

Since appellant challenges the sufficiency of the evidence [fol. 1270] we shall summarize that evidence urged by the government as ample basis for the jury verdict. This consists primarily of the testimony of three former Communist Party members who associated with Travis in various capacities as officers of Mine-Mill. Their testimony indicates that in 1942 Travis was employed by Mine-Mill as coordinator for the area of Northern California. He was at that time a member of the Communist Party with an assignment to carry on the Communist Party activities among the Mine-Mill workers in his area. Thereafter, he advanced to positions of prominent leadership in the Mine-Mill Union becoming Assistant to the President in 1946, Vice President in 1947 and President later that year. He has been Secretary-Treasurer of the Union from 1948 until the time of trial. There was extensive evidence of Travis's activities as a Communist Party member prior to 1949. No prolonged description of his actions will be undertaken here except to point out that as he progressed to positions of national leadership in Mine-Mill he was able to use those positions to further the interests of the Party. Illustrative of the scope of his activities is the evidence that in 1946 the Communist Party designated a group of its members who were prominent Mine-Mill leaders to coordinate the Communist activities within Mine-Mill with a view to controlling the union proper. Although not an official organization of Mine-Mill, this group became known as the "Steering Com- [fol. 1271] mittee." Travis was one of the initial members of the Steering Committee and its frequent meetings for planning Party strategy and organizing activities within the

[5] The judgment giving rise to the instant appeal differed from the judgment at the first trial in that fines of $2,000 were imposed on all four counts at the former trial making a total fine of $8,000.

Union were usually presided over by him "or some other ranking Communist official." His influence in these meetings was notable. On one occasion he stated to the other committee members that since the Party had gained a majority of votes on the Executive Board of Mine-Mill they should effect certain changes in Union staff and that previous actions taken by the anti-Communist faction of the Board should be reversed. These proposals were subsequently adopted by the Mine-Mill Executive Board. On another occasion Travis, as a member of the Steering Committee, participated with national officers of the Communist Party in planning strategy for the selection and support of Party-approved candidates for the international officers of Mine-Mill. The resultant strategy was later substantially carried out at a Mine-Mill national convention.

In 1947, Congress amended the National Labor Relations Act so as to restrict enjoyment of the collective bargaining advantages of its provisions to labor organizations whose officers had filed affidavits attesting that they were not members of or affiliated with the Communist Party. (29 U.S. C.A. 159(h)).

The government introduced into evidence a copy of a public statement made by Travis in the union paper by [fol. 1272] which he declared that he had resigned from the Communist Party in order to comply with the new Taft-Hartley amendment. It then undertook to show that the resignation was merely a pretense and that in fact Travis's membership in the Party continued during the period material to this conviction. The evidence in this regard delineated a Communist labor meeting in New York called to decide whether the Party would advocate that its members sign the non-Communist affidavits under the new law. It was decided that Party policy would be against signing. Appellant participated in that meeting. Later, when he reported the decision to Party members of his own union he asked his fellow Communist Gil Green if the teachings of V. Lenin, to the effect that Communists working inside trade unions must remain there at all costs, including the use of artifice or device to do so, were applicable to their situation. Green replied affirmatively and pointed out that labor leaders could circumvent the law by belonging to a "Thursday

afternoon social club" since the law pertained only to present membership and not past or future membership.

Following the passage of the non-Communist affidavit requirement of the Taft-Hartley law, the Mine-Mill Executive Board adopted a policy of non-compliance, thereby exercising its option as provided by the Act. Non-compliance, of course, resulted in inability of the union to receive the advantages of utilizing N.L.R.B. facilities for filing charges [fol. 1273] of unfair labor practices and participation in Board elections. When it became apparent that loss of advantages to the unions was causing difficulty, the Mine-Mill Executive Board by resolution reversed its previous position and adopted a policy of compliance. Travis was a member of the Executive Board when that decision was made. His statements to government witness Mason, set forth infra, at the time he wrote his "resignation statement" indicated that his action was in accordance with Communist Party policy. This resignation statement was published in the Union paper on August 15, 1949.[6]

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[6] Excerpts from this public resignation statement illustrate its general tenor:

"Since the interest of the International Union is uppermost in my mind, I have been confronted with the problem of resigning from the Communist Party, of which I have been a member, in order to make it possible for me to sign the Taft-Hartley affidavit. I have decided, with the utmost reluctance and with a great sense of indignation, to take such a step. My resignation has now taken place and as a result, I have signed the affidavit.

"This has not been an easy step for me to take. Membership in the Communist Party has always meant to me, as a member and officer of the International Union, that I could be a better trade unionist: it has meant to me a call to greater effort in behalf of the union as a solemn pledge to my fellow members that I would fight for their interests above all other interests. (Emphasis in original.)

"The very premise of the Taft-Hartley affidavits is a big lie, the same sort of lie that misled the peoples of Germany, Italy and Japan down the road to fascism. It is a big lie to say that a Communist trade unionist owes any higher loyalty than to his union. On the contrary, trade unions are an integral part of a Socialist society, the kind of society in which Communists believe. Therefore, I believe that good Communists are good trade unionists."

[fol. 1274] The government evidence pertaining to appellant's continued Party membership after the resignation statement showed that in the fall of 1951 Travis used government witness Fred Gardner, who had been recently employed by Mine-Mill, to assist him in crossing the border into Canada. Travis explained to Gardner that he was having difficulty crossing the border because of his membership in the Party and the public resignation statement and that it would be easier to cross in Gardner's car because it would not be recognized by Canadian police. He stated that Gardner had come to him well recommended by the Communist Party of Cleveland, Ohio, and that he was glad of that. Travis expressed regret that his public resignation had been necessary in order for Mine-Mill to conform to the [fol. 1275] Taft-Hartley filing requirements and in discussing this he said that he " . . . believed it was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits. . . ."

Relative to membership after execution of the first affidavit, (December 19, 1951), witness Mason testified that in March of 1952 Travis stated to him that the Soviet delegation at the World Federation of Trade Unions in Paris, France, was demanding that the "American left-wing

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"AT THE SAME TIME, I want to make it absolutely clear that my opinion continues to be that only a fundamental change in the structure of our society, along the lines implied in the very words of the charter of our International, 'Labor produces all wealth—wealth belongs to the producer thereof,' can lead to the end of insecurity, discrimination, depressions and the danger of war.

"I am convinced that capitalistic greed is responsible for war and its attendant mass destruction and horror, I am convinced it is responsible for depression, unemployment and the mass misery they generate. • • •"

• • •

"Therefore, I want to make it crystal clear that my belief in Communism is consistent with what I believe to be the best interests of the members of this Union and the American people generally and that I am especially happy to be able constantly to remember that it is consistent with the finest traditions of the International Union."

unions" who had been expelled from the Congress of Industrial Organizations form a "third federation." He said that the Communist Party had left it up to those in the unions to make the decisions and asked Mason what his view was. Travis expressed agreement with Mason's response that he opposed such a move and said that "the boys in the other unions" concurred and had left it to him, Travis, to communicate the reply to Paris.

The evidence postdating the execution of the second affidavit indicated that in March 1953 a staff conference of Mine-Mill was held in Denver, Colorado, for the discussion of organizational and political action. At this conference Travis handed to witness Mason a copy of the proposed conference agenda. Mason examined the outline of the legislative program contained therein which listed a number of items such as "repeal of the McCarran Act" and [fol. 1276] "fight against witch-hunting" and called Travis's attention to the fact that nothing was listed pertaining to betterment of workers. Travis agreed and directed that matters suggested by Mason be included. However, later that day, Travis told Mason "these other things, too, like repeal of the McCarran Act, are important, and he said 'When they get us Communists they will be after people like you if we don't get these laws repealed.' "

In June 1953, witness Gardner was to be transferred by Mine-Mill to a new assignment in the Coeur d'Alene Mining District of Idaho. Travis instructed him to stop in Denver, Colorado, on his way to Idaho for a "briefing on the Coeur d'Alene situation." Pursuant thereto, Gardner met with Travis in Denver and was told that because of a factional dispute between Communist Party members of Mine-Mill in Coeur d'Alene he was to "remain aloof" from Party activity until further notified. Travis stated that he felt assured that the dispute would be resolved by the expulsion of the leader of the faction opposing the Party regional officers and instructed Gardner that once the problem was resolved he would be contacted by someone whom Travis would identify to him beforehand and that at that time Gardner could reactivate himself in the party.

In August 1953, witness Mason had a conversation with Travis in Butte, Montana, in which he accused appellant

[fol. 1277] and his Communist Party associates of trying to undermine the leadership of Mine-Mill District Number 1 while they were in the midst of a bargaining conflict with employers. Mason stated that he was aware that this was done because the District 1 leadership opposed Communist domination of Mine-Mill, that some of the men in Montana were very angry about the situation and that he was addressing himself to Travis as the leader of the Party in the union. Appellant made no denials but suggested that he would like to take the matter up with the "boys in Denver." He suggested that Mason meet him in a few days in Denver to talk things over. In compliance Mason met Travis in Denver and again expressed his opposition to various activities in Mine-Mill including his view that the union paper constantly criticized the foreign policies of the United States without once attacking the position of the Soviet Union. Travis answered that Mason's position was in direct opposition to the Party and that he was not being realistic if he thought appellant could change the policies of the paper. Appellant continued, stating that the Communist Party leadership in Mine-Mill felt that there should be no compromises "and that he, Travis, is one of those in the Party who thinks that there have been too many compromises already, that [Mason did] not grasp the new situation, that the Soviet Union is becoming stronger, and that the position of the Communists in the Union has been stronger, we have been able to, he said, repulse the raid [fol. 1278] and hold this union and other unions." Mason threatened an open fight on the Communist issue and Travis pointed out that he would have seasoned fighters, the machine and the paper, to use against Mason in such a fight. Travis then concluded the conversation by telling Mason: "You and Joe [Mason's brother] were invited to get into the Party, had you done so, you would be sitting high in the councils of this organization with us, but you failed to do so."

Many of the points raised in appellant's brief were considered by this court in the recent case of Sells v. United States, 10 Cir., 262 F.2d 815, and need not again be treated at length. As to the evidentiary questions involved, the Sells case stands for the proposition that prosecution under

the false statements statute is not defeated by a temporary "resignation" for the purpose of signing the affidavits only. Evidence of active participation on a continuing basis both before and after the crucial time of signing and filing the affidavit is sufficient evidence from which the jury might infer that membership continued during the time in question.

Appellant has urged that the perjury rule of evidence must apply to convictions for false statements under Section 1001, 18 U.S.C.A., and that since the government's case is concededly circumstantial the evidence is legally insufficient to sustain the verdict, cf. Radomsky v. United States, [fol. 1279] 9 Cir., 180 F.2d 781; Spaeth v. United States, 6 Cir., 218 F. 2d 361. However, in the Sells case, this circuit followed the view of the 7th and 9th circuits, that the court-established rule governing the quantum of evidence required in a prosecution for perjury, viz., falsity of the statement must be shown by the testimony of two independent witnesses or other corroboration, is inapplicable to a prosecution under Section 1001. United States v. Killian, 7 Cir., 246 F.2d 77; Fisher v. United States, 9 Cir., 231 F.2d 99; Fisher v. United States, 9 Cir., 254 F.2d 302; see also Hupman v. United States, 6 Cir., 219 F.2d 243. Hence, the trial court did not err in submitting the case to the jury without instructing in accordance with the perjury rule.

The evidence of Travis's continued membership in the Party stands uncontradicted. Appellant made no attempt to affirmatively rebut the government evidence on that issue nor did he introduce evidence of his purported resignation. Instead, his defense consisted primarily in extensive cross-examination of prosecution witnesses in an endeavor to impeach and discredit their testimony. He also introduced the testimony of character witnesses as to his reputation for truth and veracity. Of course, the absence of rebutting evidence, in no way relieves the government from meeting the burden of proof. Nevertheless, it is a fundamental principle of appellate review in criminal cases that once the jury has concluded, as it did here, that the guilt of the [fol. 1280] accused was proven beyond a reasonable doubt, it is not the province nor the function of this court to weigh the evidence or to test the credibility of witnesses. United

States v. Green, 7 Cir., 246 F.2d 155. Furthermore, we are limited in the scope of our review to a determination of whether there is substantial evidence to support the verdict, Wilcoxon v. United States, 10 Cir., 231 F.2d 384, and must view the evidence in the light most favorable to the government, Evans v. United States, 10 Cir., 240 F.2d 695. With these principles in mind, a careful review of the voluminous record persuades us that the jury verdict is amply sustained by cumulative proof that appellant's Communist Party membership was not severed by the purported resignation and that he was a Party member on the dates crucial to this decision.

There is no necessity to consider the sufficiency of the evidence under the "affiliation" counts of the indictment because no fines were imposed thereon and the prison sentences on those counts were made to run concurrently with the prison sentences of the "membership" counts. Lawn v. United States, 355 U.S. 339 at 359, 78 S. Ct. 311, 2 L. Ed. 2d 321; Hirabayshi v. United States, 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed. 1774; Roviraro v. United States, 353 U.S. 53 at 59, fn. 6, 77 S. Ct. 623, 1 L. Ed. 2d 639.

Appellant contends, but without merit, that the state- [fol. 1281] ments of the affidavits, shown by the evidence and found by the jury to have been false at the time they were made, were not "material" because the union did not utilize the N.L.R.B. procedures after recognition by the National Labor Relations Board. Recognition was granted the Mine-Mill as a result of the Travis filing among others, which indeed must have been his intent in filing, and the false statement was "capable of influencing the decision of the tribunal in making a determination required to be made," Weinstock v. United States, C.A. D.C., 231 F.2d 699, 701. The materiality of the false statement is tested not by the union's use of the N.L.R.B.'s facilities but by the union's achievement thereby of a status which carries with it the right to invoke the benefit of the National Labor Relations Act. Sells v. United States, supra.

The government's witness Eckert testified that during the time that he was a member of the Communist Party, 1931 to 1948, it was the continuing policy of the Party "that once having joined the Communist Party you could

not leave without being expelled." Defendant objected to the introduction of the evidence, asserting that the testimony was based upon opinion unsupported by facts, that it was unconnected in time with the date of defendant's resignation in 1949 or the filing of the affidavits in 1951 and 1952, and that it was an attempt by the government to impute guilt by association.

[fol. 1282] Most assuredly, the evidence was probative of the second side of the question of membership, i.e. whether the Party was willing to accept the defendant and recognize him as a member, and hence admissible, but without more it could show nothing of the state of mind of the defendant and could not show that he did not, in fact, resign from the Party on the date he claimed. As was said by Judge Bazelon in a special opinion written in Gold v. United States, 237 F.2d 764, rev. on other grounds 352 U.S. 985:

> "If no one can effectively resign from the Party, no union officer with appellant's history can ever comply with sec. 9 (h) and the statutory phrase 'is not a member' is precisely equivalent to 'has never been a member.' This possibility Douds specifically rejects." (See American Communications Association v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925.)

Defendant sought to have given to the jury an instruction which could be understood to limit the purpose of the admission of this testimony, but the trial court ruled that, considered with other evidence in the record, the evidence was relevant and probative of whether or not defendant's resignation was a true resignation or a mere sham to obtain the benefits of the National Labor Relations Act for Mine-[fol. 1283] Mill. Upon this premise, counsel argued to the jury that numerous persons, including the government's witnesses, had left the Party, regardless of the Party's policy.

Whether or not the jury could properly infer from the related evidence that the defendant continued to act in obedience to this policy and that his resignation was understood to be in form only determines whether the court was correct in refusing to circumscribe its use by the jury. I Wigmore, Evidence, sec. 13.

In 1948, a meeting in New York City was held among persons of significance in the trade unions and the Communist Party[7] including the defendant and the government witness Eckert, who related what transpired. The National Trade Union Secretary of the Communist Party presided and stated that the purpose of the meeting was to determine whether or not Communist officials in the unions should be granted permission by the Party to sign the non-Communist affidavits. Despite speeches protesting that the unions were not appearing on election ballots because of lack of compliance with the law, it was decided that Com- [fol. 1284] munist union men would not sign the affidavits. Travis's reaction to the decision was one of support and obedience. The Mine-Mill adopted the policy of not signing the non-Communist affidavits.

Subsequently, Travis told another government witness, Mason, that the union was becoming more and more concerned because of the losses of elections and that the Communist Party had been again discussing whether the Communist union officials should sign the affidavits. In a second conversation with Mason in July, 1949, Travis offered him a copy of his resignation statement, which was later published in the union's paper, and said that the statement had been cleared with Ben Gold and the Party people in New York. He told Mason that "the Party thinks this is the best policy for us in the unions to follow."

In October, 1951, Travis had a conversation with the witness Gardner: " . . . . we very briefly discussed his resignation from the Party in which he pointed out that he believed that resignation, that public resignation was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely

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[7] In attendance besides Travis and Eckert, were William Z. Foster, National Chairman of the Communist Party, Eugene Dennis, General Secretary, Ben Gold, a member of the Central Committee and an official of the Fur Workers Union, John Williamson, National Trade Union Secretary of the Communist Party, Arnold Johnson, Ohio State Secretary of the Party, and officials of the Farm Equipment Union, Furniture Workers Union and Electrical, Radio, and Machine Workers Union.

to conform to Taft-Hartley affidavits, and they recognized, the enemies of the Party recognized that this was not an actual resignation, . . . ".

Thus the evidence of the Party's policy was relevant in the interpretation of the defendant's statements and be-
[fol. 1285] havior, and is not analogous to the prohibited imputation drawn from membership alone that a member endorses fully all of the precepts of the Party. Cf. Schneiderman v. United States, 320 U.S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796; Nowak v. United States, 356 U.S. 660, 78 S. Ct. 955, 2 L. Ed. 2d 1948; Maisenberg v. United States, 356 U.S. 670, 78 S. Ct. 960, 2 L. Ed. 2d 1056.

The charge that Eckert's testimony on this point was opinion unsupported by facts going to the main issue results from a confusion in the record as to whether Eckert was testifying as an expert. Eckert's position of knowing what Party policy was during the time of his membership was shown through evidence similar to that customarily evoked to qualify an expert, but he testified as to a fact within his knowledge rather than giving an opinion as an expert.

The trial court did not instruct the jury that there was a presumption, in absence of contradicting evidence, either that the Party's policy of no resignations continued or that Travis's membership, having been admitted prior to the alleged resignation and inferentially shown subsequent to that time, continued during the time the affidavits were filed. The factual effect of the evidence was left to the jury. That body might well have drawn an inference unfavorable to appellant. See Jencks v. United States, 5 Cir., 226 F.2d 540, 547, rev'd on other grounds 353 U.S. 657.

[fol. 1286] Appellant urges that Eckert's testimony was remote, irrelevant and inflammatory because early in the proceedings defense counsel offered to stipulate that Travis had been a Party member from 1941 to August 1949 and Eckert could show no more than an adherence to Party principles until 1948. Since a man's state of mind must necessarily be shown from his statements and conduct, the prosecution bore the burden of demonstrating a continuation of activities and attitudes similar to those performed and held by Travis during the time of his admitted

membership after the date of his purported resignation. The evidence of how extensively, actively and zealously Travis had worked as a Party member and his leadership in the Party was clearly relevant to the question of whether or not the resignation was a mere pretense. If it is true that evidence of Communist Party activities has a tendency to provoke present-day juries toward prejudice, it is ridiculous to suppose that the attitude of the public against a crime will prevent its prosecution. If the evidence has probative value, it is ordinarily admissible regardless of an imagined reaction of the jury, Suhay v. United States, 10 Cir., 95 F.2d 890.

Appellant insists that the trial court improperly restricted his cross-examination of prosecution witnesses by not allowing him to show that witness Mason was a government informant through fear of deportation and that Eckert [fol. 1287] and Gardner were members of a labor organization with rival interests to those of Mine-Mill. As to Mason, the evidence showed that he had been a member of the Communist Party for a brief period in the early 1930's. In cross-examining Mason, defense counsel elicited the information that he had become a naturalized citizen in 1938 and that prior to his naturalization the United States Immigration and Naturalization Service had questioned him about his past Party membership. The defense then asked Mason if he was again questioned by that Service about the same matter in 1952. The government objected to the question as improper cross-examination and counsel were heard in chambers. The defense argued that it wanted to show that the witness had an interest in testifying. Counsel suggested that Mason knew that Congress passed the McCarran Act providing for deportation of aliens on grounds of past membership in the Communist Party and asserted that it sought to elicit evidence that government agents had held out promises or threats to Mason to induce him to testify. The government insisted that the purpose of the defense was merely to embarrass the witness. The court then addressed defense counsel as a member of the Bar of the Court and asked if he knew of anything which would substantiate the charge. Defense counsel responded that he had no knowledge of promises or threats but said he had been informed

that during the pertinent period the witness was very concerned about his status as an alien and was "going around [fol. 1288] asking people questions" about it. The court then sustained the government objection stating that it did not think the inference that there were threats or promises was warranted.

Cross examination of a witness is a matter of right, The Ottawa, 3 Wall. 268, 271, and cannot be circumscribed by the courts where the questions propounded are within the framework of his testimony on direct examination, except to the extent the witness himself claims privilege or constitutional protection. However, the demonstration of a witness's bias almost always requires a search of his conduct and the circumstances of his situation, which facts may be irrelevant to the issues at trial but important to the litigants as a safeguard against false or colored testimony. III Wigmore, Evidence, §943. Prolonged digressions from the matters at hand for the purpose of exploring the manners and morals, hopes and fears, beliefs and conflicts of a personality whose connection with the trial occurs merely because of his position as a spectator can as readily abort the process of justice as can a denial of the right of cross examination. Thus, it has long been held that the scope of cross examination seeking to discredit the witness may be reasonably limited by the court responsible for the trial of the case. In Blitz v. United States, 153 U.S. 308, 312, 14 S. Ct. 924, 38 L. Ed. 725, where a question seeking to impeach a deputy marshal was not permitted, the court stated:

> [fol. 1289] "The question was clearly irrelevant, and was properly excluded. The reasons, whatever they may have been, that induced the witness not to arrest the defendant when the latter voted the second time in the same election, did not throw any light upon the issue to be determined. If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose—especially where, as in this case, the question had no reference to any matter disclosed by the examination-in-chief—is largely subject to the sound discretion of

> the trial court, and the exercise of that discretion is not reviewable upon writ of error; certainly not where the question, upon its face, suggests nothing material to the inqury whether the defendant is guilty or not guilty of the specific offense charged in the indictment."

Certain classes of facts such as family relationship to a party have been held to so strongly give rise to inferences relevant to the witness's interest and bias as to leave no room for an exercise of discretion in admissibility. III Wigmore, Evidence, §948. Among these always admissible circumstances is the fact that the witness for the prosecu- [fol. 1290] tion is under indictment or in custody at the time of trial, Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624; District of Columbia v. Clawans, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843. But these cases do not govern the situation of the witness Mason in the present case and, in fact, reaffirm the view of the Blitz case that, in the absence of an abuse of discretion, the decision of permitting or excluding extrinsic evidence for impeachment purposes rests with the trial judge. As stated by Professor Wigmore, new circumstances will constantly be presented as suggestive of personal prejudice and the trial court must determine whether from the conduct, language or circumstances of the witness a palpable hostility to one party or sympathy for the other is inferable.

The inference that the witness Mason was coercively influenced to testify by a power over him held by immigration officials requires imagination to be applied in disparagement of facts appearing in the record. Mason is a naturalized citizen, not an alien subject to deportation. If wild surmise permit the deduction that he had committed a fraud in his application for citizenship by concealing his membership in a subversive group, which might be used to return him to an alien status, such conjecture is dispelled by his revelations to the Service in 1938. Therefore, we find no abuse of discretion on the part of the trial court in excluding the question as to the witness's more [fol. 1291] recent contacts with immigration officials.

As to the cross examination of Eckert and Gardner, Appellant urges that it was error for the trial court to

sustain objections to questions concerning alleged rivalries between Mine-Mill and the labor organization then employing those two witnesses. The trial court in ruling on the matter expressed the view that any possible inference that could be drawn from a showing of such rivalry would be too remote to be relevant. In arguing that this was error, appellant cites authorities for the proposition that it is within the proper scope of cross examination to show that the witness is testifying for his employer,[8] that his employer has an interest in the recovery,[9] is employed by the law firm representing the party for whom he testifies,[10] or when his employer is a business competitor of the party against whom he testifies.[11] He also cites a decision of this court to the effect that it is proper to probe the employment of a witness where he is an adjuster for a group of fire insurance companies, possibly interested in the suit, where the action sought damages for negligent installation [fol. 1292] of a furnace.[12] However, none of those cases has gone so far as appellant asks that we go here. Each of those cases was a civil action in which the employer had some interest in the outcome of the suit. But this is a criminal action and it is brought against Travis, not against Mine-Mill. What appellant asks is that he be allowed to show rivalry between the unions in order to impute prejudice against Mine-Mill to the witness and then asks the jury to infer therefrom bias against Travis. It is not reversible error to restrict cross-examination questions having only a slight and indirect bearing on the bias and credibility of a witness. District of Columbia v. Clawans, supra. The trial court correctly ruled that the evidence was too remote to be admissible.

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[8] Central Truck Lines v. Lott, 5 Cir., 249 F.2d 722.

[9] Majestic v. Louisville and N.R. Co., 6 Cir., 147 F.2d 621.

[10] Lexington Glass Co. v. Zurich General Acc. and Liab. Ins. Co., Ky. App., 271 S.W. 2d 909.

[11] Manley v. Northumberland County, D.C.M.D. Pa., 32 F. Supp. 775.

[12] Theurer v. Holland Furnace Co., 10 Cir., 124 F.2d 494.

Appellant next complains of the instructions to the jury concerning the meaning of membership in and affiliation with the Communist Party.[13] He argues that the definition

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[13] The trial court instructed the jury as follows:

"Whether or not the defendant was a member of the Communist Party at the times alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those [fol. 1293] person(s) who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the times alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant: 1. Has made himself subject to the discipline of the Communist Party in any form whatsoever; 2. Has executed orders, plans, or directives of any kind of the Communist Party; 3. Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party; 4. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; 5. Has been accepted to his knowledge as an officer or member of the Communist Party or as one to be called upon for services by other officers or members of the organization; 6. Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans

[fol. 1295] of "membership" used by the court was so all embracing and vague as to be meaningless destroying as a consequence any distinction between "membership" and

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of the Communist Party; 7. Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; 8. Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization; 9. Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; 10. Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization; 11. Has in any other [fol. 1294] way participated in the activities, planning, actions, objectives, or purposes of the organization.

"These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts it is your duty to consider all the evidence either direct or circumstantial which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.

"In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt, that the defendant was a member of the Communist Party on December 19, 1951, and December 3, 1952, as alleged in the indictment, and if you find also that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first and fourth counts of the indictment, as I have outlined them to you, then you must find the defendant guilty as to the first and fourth counts.

"If, however, you find that the Government has not sustained the burden of proving beyond a reasonable doubt that the defendant was a member of the Communist Party on the dates alleged in the indictment, then you must find him not guilty as to the first and fourth counts.

"'Affiliation' as used in the second and fifth counts of the indictment is not the same as membership. The word 'affiliated', as used in the second and fifth counts of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close

"affiliation." We see no substance to this contention. In charging the jury with respect to the components of Communist Party membership and affiliation the trial court carefully followed the directions of this court expressed in the opinion on the first appeal.[14] The instructions were meaningful and clear. They included 11 of the 14 indicia of membership outlined by Congress in Section 5 of the Communist Control Act of 1954 (50 U.S.C.A. 844) and emphasized the primary element of membership as suggested by Mr. Justice Burton in Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed., 2d 1103, i.e.: ". . . there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member." This adequately outlined the kind of acts that could be considered evidence of membership and included the idea of the continuing reciprocal relationship necessary for that status.

The jury was told that Travis's membership in the Communist Party at the times alleged in the indictment was [fol. 1296] to be determined from "all the evidence in the case" and they were not limited solely to consideration of the indicia of membership enumerated by the court. However, this in no way indicates, as appellant contends, that the jury was told it was free to consider anything in

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working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite period upon a fairly permanent basis.

"'Affiliation' includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving a reasonable cause for the charge of a breach of good faith.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you, ladies and gentlemen, are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence." (Record 1228-1230.)

[14] 247 F.2d 130, at 135 and 136.

evidence as proof of membership. The court went on to clarify: ". . . it is your duty to consider all the evidence . . . *which bears upon the question of whether or not the defendant was a member of the Communist Party on the dates alleged in the indictment.*" (Emphasis added.) Furthermore, it must be presumed that the jury, after such careful instructions on the components of membership, is perfectly capable of separating evidence which tends to prove membership from evidence which does not. Appellant also argues in this connection that the instructions left the jurors free to use single items of evidence standing alone as the basis for their findings. Such was not the case. They were instructed that isolated acts or statements were circumstances they could consider, but were cautioned that these were not in themselves conclusive proof of membership and were only to be considered in connection with the other evidence, that they were to weigh all the evidence bearing on the crucial issues, and that the government retained the burden of proving guilt beyond a reasonable doubt.

Nor is there any merit to the contention that the jury was left free to infer membership at the time of signing [fol. 1297] the affidavits from appellant's past Party membership or from the conclusion that the resignation was not honest. The instructions clearly contravene this argument:

> "The crucial issue of fact in this case is whether on December 19, 1951, and December 3, 1952, Maurice E. Travis was or was not then a member of the Communist Party or affiliated with such party.
>
> "The affidavits do not call upon any person to state whether or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past either a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavits would be entitled to sign the affidavits under oath without violating the law.
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> "Since the affidavits speak in the present tense only, the fundamental issue of fact for you to decide is

whether or not at the times alleged in the indictment the defendant knowingly and wilfully used an affidavit which was false and which he knew to be false at that time."

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"You may not presume the existence of a fact and [fol. 1298] then infer from such presumed fact the existence of any other fact or circumstance. You may not infer from any presumed fact or facts that the defendant is guilty of any of the offenses charged in the indictment."

It is urged that the trial court should have clarified what bearing the pre-affidavit and post-affidavit evidence had on guilt and that it should have pointed out which evidence was relevant to each affidavit. We do not agree. The court should not be required to emphasize particular portions of the evidence. To require trial courts to suggest to the jury the inferences which may be drawn from the evidence would be to invite error. Radius v. Travelers Ins. Co., 9 Cir., 87 F.2d 412. Further, it would be an invasion of the province of the jury to judicially measure the weight of circumstances which the jury can determine equally as well. Majestic v. Louisville & N. R. Co., 6 Cir., 147 F.2d 621.

Further error is alleged in the refusal of the court to give several requested instructions. We shall not lengthen this opinion by discussing appellant's many contentions in this regard. It is sufficient to say that the instructions given to the jury were complete and proper. Moreover, the jury was admonished with particularity as to all the safeguards that should properly surround a criminal prosecu- [fol. 1299] tion. The rejected instructions added no proper charge which was not covered by those actually given and there was no error in refusing to give them.

After each of the government witnesses had testified on direct examination at the trial, appellant moved that the prosecution be required to produce all reports and statements previously made by those witnesses to any agent of the government as provided under 18 U.S.C A. 3500. The motions were granted but since the government claimed that

the statements of each witness contained matter not related to the subject matter of his testimony as a witness, the trial court, pursuant to Section 3500(c), examined the statements *in camera* and excised the unrelated matters before delivering them to appellant.

Appellant's claims anent the constitutionality of section 3500 were examined fully in the Sells case, supra. Inasmuch as the availability to the defense of documents held by the government is limited under the decision of Gordon v. United States, 344 U.S. 414, 73 S. Ct. 369, 97 L. Ed. 447, and Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, to matters relevant to the testimony of a witness for the prosecution, Section 3500 merely provides the procedure by which that relevancy may be determined and deprives the defendant of nothing to which he was formerly entitled. Of course, the excised portion of a statement must be available for review to test the correct-[fol. 1300] ness of the trial court's judgment in eliminating it from consideration by the defense.

The United States Supreme Court has held in recent decisions, Palermo v. United States and Rosenberg v. United States, decided June 22, 1959, that Section 3500 is constitutional and governs the rights of a defendant to the production of documents in the hands of the prosecution. Further, the court approved the *in camera* inspection by the trial court as the proper procedure to be followed in determining the application of the statute to the particular statements sought by the defense. We have carefully examined and compared the complete documents and the documents as they were submitted finally to the defense and conclude that the only excised portions related to matters and persons not connected with the present case.

Counsel for appellant has skillfully anticipated a great many problems which will yet arise before the administration of Section 3500 is stabilized by precedent. Most of these problems are not made ripe for decision under the present case.

Appellant suggests that the trial court delegated its responsibility for the determination of whether or not certain documents contained "statements" within the purview of Section 3500(e) which should be made available to the de-

fense. He contends that if the prosecution determines that no part of a statement relates to the subject matter or, if it [fol. 1301] does, that it is not a "statement" as defined in subsection (e), then the trial court never inspects the statement at all and it is not preserved for the record. "There is appellate review if only part of a document is withheld from the defense; none, if the entire document is withheld." This problem was foreseen by the United States Supreme Court in the Palermo case, supra, and the production by the government of doubtful writings and in camera determination of the subject matter and whether it comes within the definition of "statement" of subsection (e) was approved. This ruling, however, does not aid appellant for the record shows merely that the three witnesses, Eckert, Mason, and Gardner, had talked with government attorneys in preparation for this case and that Eckert had talked to an investigator for a congressional committee. The subject of these conversations was Travis and Mine-Mill, but there is nothing in the record to indicate that these witnesses had in these instances written, signed, adopted or approved any writing or that any recording was made of any oral statement made to these agents. It is presumed that these agents took notes or made summaries of their conversations with the witnesses but such interpretations would not be "statements which could properly be called the witness' own words," Palermo v. United States, and the witnesses denied signing or adopting any such statements.

Appellant moved for the production of the witnesses' [fol. 1302] testimony before one or more grand juries. The theory that either the Jencks decision, Jencks v. United States, supra, or the Jencks Act, Section 3500, encompass grand jury testimony was discarded in Pittsburgh Plate Glass Co. v. United States (U.S.) decided June 22, 1959. Unlike the appellant in that case, however, appellant here moved the court for inspection of the grand jury minutes as a matter of right and alternatively to have the minutes produced for the court's examination and determination whether inconsistencies appeared between the witness's testimony before the grand jury and his testimony at trial.

Thus, the question here is the one particularly left undecided by the Pittsburgh Plate Glass case: Whether the

trial court may, in the discretion granted him under Rule 6 (e), Fed. Rules Crim. Procedure, refuse to examine the transcript of the grand jury when requested to do so. Rule 6 (e), provides:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in con-
> [fol. 1303] nection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. . . ."

It has been held that instances when the need for disclosure of grand jury proceedings outweighs the countervailing policy maintaining the secrecy of such proceedings must be shown with particularity, United States v. Procter & Gamble Co., 356 U.S. 677, 78 S. Ct. 983, 2 L. Ed. 2d 1077. The burden is on the defense to show that "a particularized need" exists for the minutes which outweighs the policy of secrecy, Pittsburgh Plate Glass Co. v. United States, supra. Thus, where some portion of a defendant's testimony was impeached by the government's use of her grand jury testimony, it has been held that the trial court should make an inspection of all of her testimony for the purpose of disclosing other inconsistencies to the use of a co-defendant, United States v. H. J. K. Theatre Corporation, 2 Cir., 236 F.2d 502, but this is a far cry from requiring a trial court to examine all of the testimony of all of the witnesses for the prosecution upon the defense's hope of thereby uncovering some inconsistency. In view of prior statements of these witnesses made available to the defense, in which there appeared no suggesti of material inconsistency, it is un-
[fol. 1304] likely that their statements to the grand jury occurring at a time between the giving of such statements and consistent statements upon trial would produce im-

peaching material. Appellant shows inaccuracies in the testimony of the witnesses (i.e. Gardner thought he had testified in another case the prior week but actually it was two weeks earlier; Eckert had testified on seven previous occasions against Mine-Mill but his testimony as to details was not precisely the same on each occasion; Gardner's evidence at trial was not shown on the reports which he made to the F.B.I.; Mason stated to the F.B.I. that he was "unable to enlarge" on information about appellant, but at trial gave other specific information); these inaccuracies might well give rise to argument concerning the witnesses' memories and powers of observation which were available to the defense from the materials produced by the government. They do not demonstrate a reason for believing that the witnesses' testimony was biased or impeachable on material fact. They do not compel the conclusion that the testimony before the grand jury requires further investigation.

Since the permission or refusal of a defense inspection of grand jury minutes rests in the discretion of the trial court, United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129, and since no showing was made of a particularized need for the grand jury minutes in the maintenance of the defense, Pittsburgh Plate Glass [fol. 1305] Co. v. United States, supra, we hold that the trial court did not abuse its discretion in failing to order the production of grand jury minutes in this case where difficulties have arisen not from the paucity of evidence but from its plethora.

Affirmed.

MURRAH, dissenting.

In the first place, I would apply the perjury rule for the reasons so well stated by Judge Bazelon in Gold v. United States, 237 F. 2d 764. As in that case, the charge is false swearing, the evidence is indeed indirect and circumstantial, and in my judgment inconclusive. The only reason assigned for the inapplicability of the ancient and accepted perjury rule requiring direct and positive evidence of guilt, is that in cases of this kind, its application would

"merely thwart the attainment of the end which Congress sought to accomplish by the enactment of Paragraph 9(h)." See Sells v. United States, 262 F. 2d 815. But there is nothing in the legislative history of Section 9(h) to indicate that the Congress entertained the view that the perjury rule was inapplicable to prosecutions under Section 1001, as in Section 1621. See Judge Bazelon in the Gold case, Note 17. While feeling myself bound by the pronouncements of my court in the Sells case, I cannot refrain from [fol. 1306] expressing the hope that such is not the law in cases of this kind.

I would reverse this case and remand it for a new trial for the refusal of the trial court to examine the grand jury evidence in camera, to determine whether the lid of secrecy ought to be lifted in the interest of the proper administration of criminal justice. We know that grand jury testimony may be disclosed only upon a showing of a particularized need, and the burden of showing that need is on the one seeking it. But if the rule is to have any efficacy, its burdens ought not to be insurmountable.

How then may the accused lay a foundation for requisite inconsistency when he does not have access to the testimony or any other means except cross examination in the hope that something will turn up? In our case the cross examination of the prosecuting witnesses disclosed that they had testified in numerous cases of this kind, as well as before the grand jury which had indicted the accused. There were some inconsistencies in the testimony they had given in other open proceedings. But there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court.

It is for these reasons that we have committed to the trial court the judicial function of determining ex parte [fol. 1307] whether the testimony of the witnesses is substantially consistent. And, the court cannot exercise that important function unless he knows something of the witnesses' testimony. It would seem therefore that the trial court erroneously and prejudicially refused to take a judicial look at the grand jury testimony. Cf. United States v. Spangelet, 258 F.2d 338. It may be that we would be

justified in having the grand jury testimony certified for examination here, as was done in United States v. Lev, 258 F.2d 9. Unless it is done, I certainly can't say that it was harmless error to refuse to look at it.

This case is important, not only to the accused here, but as a guiding precedent in other cases. I do not believe we can dispose of the question by simply saying that it was harmless.

[fol. 1308]

IN UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Honorable Orie L. Phillips, Honorable Alfred P. Murrah and Honorable David T. Lewis, Circuit Judges.

JUDGMENT—August 3, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Maurice E. Travis, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

[fol. 1309]

IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5879

MAURICE E. TRAVIS, Appellant,

—vs.—

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING—Filed August 13, 1959

Appellant, by his attorney, respectfully petitions for rehearing, and in support thereof, shows:

I. The judgment affirming the conviction was entered on August 3, 1959, at which time an opinion was filed, together with a dissenting opinion by Judge Murrah.

II. The opinion of the Court should be reconsidered with respect to appellant's contention "that the trial court improperly restricted his cross-examination of prosecution witnesses by not allowing him to show that witness Mason was a government informant through fear of deportation and that Eckert and Gardner were members of a labor organization with rival interests to those of Mine-Mill" (p. 22).[1]

A. In upholding the ruling of the District Court with respect to the cross-examination of the witness Mason, the [fol. 1310] opinion correctly states that Mason is a naturalized citizen who can be denaturalized only on the ground of fraud in connection with his prior Communist Party membership. Since he had not concealed his membership when he was naturalized, he had not committed any fraud and the defense therefore was seeking to make a showing which is belied by the record (pp. 25-26).

[1] References in this form, unless indicated otherwise, are to the typewritten copies of the opinion. Printed slip copies were not available when this petition was being prepared.

This analysis, however, misconceives appellant's argument. The argument is not that Mason was legally subject to denaturalization under the immigration laws. The Court is of course correct in concluding that he was not. The argument the defense made on the trial was that, whatever the law provided, the defense had information that following the passage of the McCarran Act of 1950, providing for the deportation of aliens because of past membership in the Communist Party, Mason was fearful of denaturalization and then deportation, even though, as a matter of law, there were no grounds for his fear (R. 939-941).[2] And the fact that the Immigration and Naturalization Service did in fact interrogate Mason in 1952 about his past membership, even though there was no legal basis on which he could be denaturalized, would account for Mason's concern and the fact that he then became an FBI informant.

Whatever the law provided, then, Mason was concerned about the matter and it was the government itself which had generated or had helped generate or stimulate his concern. In these circumstances, it was error not to permit the defense to show, first, that Mason had been worried about the matter even though there was no cause for him to have been, and second, that his worry led him to become an informant and to give information and testimony about appellant (Appellant's Brief, pp. 44-45).

B. With respect to the limitation of cross-examination of Eckert and Gardner, the opinion of the Court overlooks one aspect of the *Clawans* case, 300 U.S. 617, which the opinion cites on the problem of the scope of cross-examination in general (pp. 25, 27) and neglects altogether to consider the effect of *Lee Way Motor Freight, Inc.* vs. *True*, 165 F.2d 38, in this Court, or even to cite it, even though it was the leading case on the matter discussed in appellant's brief (pp. 49-50).

[fol.1311] *Clawans* was a criminal case and it was there held that it was error not to permit the defense to show that, by reason of the nature of their employment, witnesses for the prosecution were interested in having the defendant

[2] References in this form are to the transcript of record on appeal.

convicted. 300 U.S. 617, 630-631. The distinction made in the opinion of the Court between civil and criminal actions (p. 27) is therefore without foundation.

Secondly, in light of the *Lee Way Motor Freight* case, it is difficult to see how it can be concluded that the matter of the employment of Eckert and Gardner by labor organizations rival to Mine-Mill had "only a slight and indirect bearing" on their bias and credibility (p. 27). If, as the opinion in the *Lee Way Motor Freight* case says, a witness may be asked if he has a bitter feeling against the cross-examiner because of other litigation in which the witness was interested and in which the cross-examiner represented one of the parties, it is difficult to see how the employment of Eckert and Gardner had "only a slight and indirect bearing" on their bias and credibility in this case.

Furthermore, common experience (illustrated by this very record) teaches us that rivalries and hatreds in the labor movement are passionate and intense and that organizational rivalries and personal enmities go together. We need not go back 20 years to recall the feud between John L. Lewis and William Green. It was difficult to distinguish the feud between the AF of L and the CIO, on the one hand, and the personal hatred of the two men, on the other. Who, reading almost any day's newspaper, doubts that George Meany or Walter Reuther would not be altogether objective and impartial if called upon to give testimony against James Hoffa in a criminal prosecution? How, then, can it be concluded that the rivalry between the United Auto Workers and the Hod Carriers, on the one hand, and Mine-Mill, on the other, would not affect the feelings of Eckert and Gardner in giving testimony against Travis?

It denies the facts of life, then, to conclude that Mine-Mill would not be affected by the outcome of the prosecution of Travis. In other words, it is unreasonable to conclude that the relationship is "remote," in the same way as it would be to conclude that a conviction of Hoffa would have no bearing on the fortunes of the Teamsters Union.

III. There is no need to burden the Court by rearguing at length the improper procedure followed by the District

Court in connection with 18 U.S.C.A. 3500. We desire only [fol. 1312] to point out that, with respect to the matter of statements made by the three witnesses to government attorneys and to a congressional committee investigator, it was improper to place on the defense the burden of showing that these were "statements" as defined in subsection (e). As the Supreme Court said in *Palermo*, the prosecution must produce "statements" without any preliminary showing by the defense that they exist. In this case, the prosecution refused to say whether the witnesses had made "statements" to the attorneys and to the investigator on the ground that they are not "agents" within the meaning of Section 3500. Instead of ruling on that point, the District Court insisted that the defense had to show that there were "statements" of that character first (R. 527). The prosecutor took one position, the District Court took another. They were both in error and, as a result, the prosecution was able to evade its responsibility under Section 3500 by not being required to advise the Court whether there were "statements" of this nature. The opinion of this Court, insofar as it also places on the defense the burden of showing there are "statements" which the prosecution has failed to produce (p. 36), is not consistent with *Palermo*.

IV. Insofar as the production of grand jury testimony for the purpose of impeachment is concerned, the opinion of the Court (pp. 36-40) misinterprets the *Pittsburgh Plate Glass* case in two respects.

In the first place, it is not accurate to say that "the question here" is the one left undecided by the *Pittsburgh Plate Glass* case, that is, whether the trial court should have examined the grand jury testimony (p. 37). Since the defense moved for direct production and, alternatively, for production to the District Judge, and since the *Pittsburgh Plate Glass* case holds that both procedures lie in the discretion of the trial court, this Court should have decided whether discretion was properly exercised in both respects. Instead, the opinion of the Court proceeds on the unspoken assumption that *Pittsburgh Plate Glass* decides that direct production to the defense is never appropriate and goes on to deal only with the alternative motion.

The second misinterpretation proceeds from the first. The opinion of the Court states that the defense must show "a particularized need" for inspection by the trial court (p. 38). But Mr. Justice Clark's opinion in the *Pittsburgh Plate Glass* case makes it clear that this showing is required [fol. 1313] when the issue relates to direct production to the defense, not when the issue is whether the trial court should examine the testimony first. The only reasonable conclusion is that inspection by the trial judge supplies what a showing of "particularized need" does to justify direct production.

In this connection, the opinion of the Court neglects to deal with appellant's contention that the trial court, by foreclosing all inquiry of the witnesses about their grand jury testimony, made it impossible for the defense to show "a particularized need." Even if the matter of production, directly to the defense or preliminarily to the trial judge, lies in the discretion of the trial judge, it is difficult to see how the discretion can be exercised rationally unless the defense is permitted to make a showing that it should be exercised on the side of production. Only thus can the defense show "a particularized need." If it succeeds, then the grand jury testimony should be produced directly to the defense. If it fails, then the trial judge should make an inspection first.

Nathan Witt, P. O. Box 156, New York 23, New York,
Attorney for Appellant.

I certify that the above is filed in good faith and not for the purpose of delay.

Nathan Witt

[fol. 1314]

IN UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

ORDER DENYING PETITION FOR REHEARING—August 21, 1959

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied, Honorable Alfred P. Murrah, Chief Judge, dissenting.

By order of September 1, 1959, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that day under provision of paragraph 3 of rule 28 of said court.

[fol. 1315] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1316]

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1959

MAURICE E. TRAVIS, Petitioner,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 8, 1959

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

October 20th, 1959.

Charles E. Whittaker, Associate Justice of the Supreme Court of the United States.

Dated this 8th
day of September, 1959.

[fol. 1317]

SUPREME COURT OF THE UNITED STATES

No. 479—October Term, 1959

MAURICE E. TRAVIS, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 31, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is consolidated with Nos. 75 and 872 and a total of three hours is allowed for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.